Supreme Court, U.S.
FILED
97 950 DEC 8 1997
OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1997

CELINDAH J. GRIER,

Petitioner,

vs.

TITAN CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

JOHN M. BREDEHOFT
Counsel of Record
ELAINE C. BREDEHOFT
LINDA M. JACKSON
CHARLSON & BREDEHOFT, P.C.
Attorneys for Petitioner
11260 Roger Bacon Drive
Suite 201
Reston, Virginia 20190
(703) 318-6800

72581 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, Inc.

66 pp

QUESTIONS PRESENTED FOR REVIEW

1. Is a jury's finding of intentional and unlawful retaliation against an employee for taking actions protected by Title VII of the Civil Rights Act, a finding confirmed both by the trial and appellate courts, sufficient to permit the jury to award punitive damages under a statutory standard which requires merely a finding of "reckless indifference" to the plaintiff's statutory rights?

2. Must an employee forced to resign employment demonstrate that the employee literally had "no choice" but to quit, in order to recover on a theory of constructive discharge under Title VII of the Civil Rights Act?

LIST OF PARTIES TO THE PROCEEDING

This matter involves two parties: Petitioner Celindah Grier, plaintiff below, and her former employer, Respondent Titan Corporation, defendant below.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	iv
Citation of the Reports of Opinions in the Case	1
Statement of the Basis for Jurisdiction	1
Statutes and Constitutional Provisions Involved	1
Statement of the Case	2
A. Factual Predicates for Petitioner's Claims	2
B. Proceedings Below	4
Reasons for Granting the Writ	5
I. In Opposition To Every Other Circuit, The Court Of Appeals In This Case Held That A Finding Of Intentional, Unlawful Retaliation Is Not Sufficient To Permit A Jury To Find "Reckless Disregard" Of A Plaintiff's Rights, And To Impose Punitive Damages.	6
II. The Court Of Appeals Applied An Unduly Restrictive Standard For Determining Constructive	

Contents

Page

Discharge, In Conflict With Decisions From Other Courts Of Appeals And Earlier Decisions From The Fourth Circuit Itself. 12

A. Ms. Grier Was Given "No Choice" But To Resign 12

B. The Court of Appeals Applies An Impossibly Restrictive Standard for Proof of Constructive Discharge, In Conflict with Earlier Decisions from That Court And From Other Courts of Appeals. 13

Conclusion 17

TABLE OF CITATIONS

Cases Cited:

Acrey v. American Sheep Industry Association, 981 F.2d 1569 (10th Cir. 1992) 15

Amirmokri v. Baltimore Gas & Electric Co., 60 F.3d 1126 (4th Cir. 1995) 12

Blistein v. St. John's College, 74 F.3d 1459 (4th Cir. 1996) 13

Bristow v. Daily Press, Inc., 770 F.2d 1251 (4th Cir. 1985), *cert. denied*, 475 U.S. 1082, 106 S. Ct. 1461, 89 L. Ed. 2d 718 (1986) 14, 15

Contents

Page

Brown v. Eckerd Drugs, Inc., 663 F.2d 1268 (4th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128, 102 S. Ct. 2952, 73 L. Ed. 2d 1345 (1982) 14, 15

Burks v. Oklahoma Publishing Co., 81 F.3d 975 (10th Cir. 1996) 15

Equal Employment Opportunity Commission v. Massey Yardey Chrysler Plymouth, Inc., 117 F.3d 1244 (11th Cir. 1997) 15

Holsey v. Armour & Co., 743 F.2d 199 (4th Cir. 1984), *cert. denied*, 470 U.S. 1028, 105 S. Ct. 1395, 84 L. Ed. 2d 784 (1985) 14, 15

Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568 (8th Cir. 1997) 15

Kolstad v. American Dental Association, 108 F.3d 1431 (D.C. Cir. 1997) 9, 10, 11

Lilly v. Harris-Teeter Supermarket, 720 F.2d 326 (4th Cir. 1983), *cert. denied*, 466 U.S. 951, 104 S. Ct. 2154, 80 L. Ed. 2d 539 (1984) 14, 15

Martin v. Cavalier Hotel Corp., 48 F.3d 1343 (4th Cir. 1995) 14

Maschuka v. Genuine Parts Co., __ F.3d __, 1997 U.S. App. LEXIS 21132 (8th Cir. Aug. 11, 1997) 15

Contents

Page

Merriewether v. Family Dollar Stores of Indiana, Inc., 103 F.3d 576 (7th Cir. 1996) 9

Paroline v. Unisys Corp., 879 F.2d 100 (4th Cir. 1989), *dissenting opinion adopted in part*, 900 F.3d 27 (1990) (en banc) 13, 15

Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194 (1st Cir. 1987) 11

Sheridan v. E.I. DuPont de Nemours and Co., 100 F.3d 1061 (3d Cir. 1996) 16

Smith v. Wade, 461 U.S. 30, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983) 7, 8, 11

Vasbinder v. Ambach, 926 F.2d 1333 (2d Cir. 1991) ... 8

Williamson v. Handy Button Machine Co., 817 F.2d 1290 (7th Cir. 1987) 8, 9

Statutes Cited:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

42 U.S.C. § 1981 ..... 6, 11

42 U.S.C § 1981a 1, 6, 8

Contents

	Page
42 U.S.C. § 1983	8
42 U.S.C. § 2000e, *et seq.*	2
42 U.S.C. § 2000e-3(a)	1
Rule Cited:	
Fed. R. Civ. P. 59	4

APPENDIX

Appendix A — Opinion Of The United States Court Of Appeals For The Fourth Circuit Argued July 7, 1997 ..... 1a

Appendix B — Transcript Of Proceedings Dated January 3, 1997 ..... 7a

Appendix C — Order Of The United States District Court For The Eastern District Of Virginia, Alexandria Division Filed December 24, 1996 ..... 19a

Appendix D — Order Of The United States District Court For The Eastern District Of Virginia, Alexandria Division Dated July 22, 1996 ..... 32a

Appendix E — Order Of The United States Court Of Appeals For The Fourth Circuit Denying Petition For Rehearing Filed September 9, 1997 ..... 34a

Appendix F — Statutory Provisions Involved 36a

CITATION OF THE REPORTS OF OPINIONS IN THE CASE

None of the opinions in this case have been reported officially. The opinions of the District Court were rendered orally, and are included in the Appendix. The opinion of the Court of Appeals affirming the District Court, and the order denying rehearing or rehearing en banc, are also included in the Appendix.

STATEMENT OF THE BASIS FOR JURISDICTION

The opinion of the Court of Appeals in this matter was issued on August 15, 1997. A timely petition for rehearing and suggestion for rehearing en banc was filed on August 28, 1997 and was denied on September 9, 1997.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) to review the judgment in question by writ of certiorari. The order of the district court from which an appeal was taken to the Court of Appeals was a final order, and jurisdiction in the Court of Appeals was proper under 28 U.S.C. § 1291.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes involved are set forth verbatim in the Appendix. The statutes and provisions involved are the anti-retaliation provision of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-3(a); and Section 107 of the Civil Rights Act of 1991, 42 U.S.C § 1981a.

STATEMENT OF THE CASE

A. Factual Predicates for Petitioner's Claims

This is an employment discrimination case under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, *et seq.* Ms. Grier opposed gender discrimination at Titan Corporation. In return, she was retaliated against by, and ultimately forced to resign from, Titan in 1994. Ms. Grier was formerly the Deputy General Manager of Titan Corporation's operations in Virginia, and the highest-ranking female technical employee in a company of over 1000 employees. After repeated attempts to have Titan address its pervasive discrimination against women, Titan's top managers successfully plotted to force Ms. Grier's resignation.

Titan's reckless indifference to unlawful discrimination was evident from the outset. The initial response from Ms. Grier's supervisor, the Titan General Manager, was "that my complaints were bullshit . . . [and h]e would not tolerate any such complaints on his project. . . ." J.A. at 4856. (References to the record are to the Joint Appendix in the Court of Appeals.)

Titan's Human Resources director, Cheryl Sundin, called Ms. Grier a "troublemaker" and noted that Titan was formulating a "plan" to "get rid" of her. J.A. 5451, 5459, 5479-80, 5484. Specifically, Ms. Sundin stated that the "trouble" with Ms. Grier was her complaints of gender discrimination. J.A. at 5480-81.

Ms. Grier, the Deputy General Manager, was relieved of her management responsibilities. J.A. at 4881-82. The reason was clear: as Titan's General Manager told Ms. Grier, the male co-worker of whom she had complained "did not want me to be in any kind of a leadership role on the project," J.A. at 4890, because she "made too many complaints about him," J.A. at 4896; specifically the co-worker "was upset because I had complained about his treatment of women . . . ." J.A. at 4993.

In September 1994, Ms. Grier again discussed the matter with General Manager Mike Walker, with Mr. Walker's superior and Titan President Ed Knauf, and with Titan General Counsel Marshall Nelson. J.A. at 5047. As Ms. Grier "started to discuss one of the charts which was a summary related to my complaints of discrimination," J.A. at 5052, General Counsel Nelson interrupted and told Ms. Grier that "the company feels that they have done everything they need to do." J.A. at 5052-53.

Ms. Grier responded to this indifference by telling the participants that her situation "had been intolerable. . . ." J.A. at 5067. General Counsel Nelson responded by telling Ms. Grier that she "clearly . . . didn't want to be there, and so I should call his assistant [Cheryl Barr] and talk about a severance." J.A. at 5245.

After many days of fruitless discussion, Ms. Barr finally told Ms. Grier that she had a "response from the company" to Ms. Grier's complaints; that she had "looked into all the information [Ms. Grier] had sent her," and that Titan's response was "they are giving you a severance." J.A. at 5083.

Ms. Grier met again with Titan President Knauf in the middle of October, 1994, to discuss Ms. Grier's "continuing to work while [she] was looking for a job." J.A. at 5090. Knauf told Ms. Grier that "it was temporary work," J.A. at 5091, with no management, supervisory, or technical responsibilities, and no opportunity to make up the more than $50,000 supplemental compensation she had been denied. J.A. at 5093. Knauf suggested that Ms. Grier use an out-placement service. J.A. at 5294.

Ms. Grier again met with Knauf at the beginning of November 1994. J.A. at 5098. Knauf told Ms. Grier that Mr. Walker would agree to allow her to return as Deputy General

Manager. Knauf, however, also made clear that Ms. Grier's position would be hollow:

> [I]t's not going to be as the chief engineer, and it's not going to be as the project manager, and it's not going to be any leadership role.

J.A. at 5099-5100. Indeed, when Knauf was asked at trial what role Ms. Grier would actually have if she returned as deputy general manager, he testified, "I have no idea." J.A. at 5859.

Titan President Knauf emphasized to Ms. Grier that the male employee who was the subject of many of Ms. Grier's complaints — and formerly her subordinate — remained the Titan "program manager," and that Ms. Grier "needed to understand that in this company, program manage[r]s were God." J.A. at 5875 (emphasis added).

Given these circumstances, Ms. Grier told Mr. Knauf that Titan's offer to let her stay in a makework position while she searched for a new job "was not a serious offer. . . . That just simply was not a real job. . . . [Titan President Knauf] agreed." J.A. at 5109-11. Ms. Grier resigned.

B. Proceedings Below

Ms. Grier sued, and tried her case to a jury in April 1996. The properly-instructed jury found in her favor on her retaliation and constructive discharge claims, awarding $635,000 (including $275,000 in punitive damages). The district court denied Titan's motion for judgment as a matter of law during and after trial, but granted a new trial to Titan pursuant to Fed. R. Civ. P. 59, setting aside the $635,000 verdict.

Ms. Grier tried her case to another jury in November 1996. That properly-instructed jury also found in Ms. Grier's favor on her retaliation and constructive discharge claims, awarding $829,500 (which included $800,000 in punitive damages). Despite substantial additional evidence proffered at the second trial, the district court granted Titan's motions for judgment as a matter of law as to Ms. Grier's constructive discharge claims and all of her claims for punitive damages. The trial judge denied Titan's motions for judgment or for a new trial as to the compensatory damages awarded on the retaliation claims, and entered judgment for Ms. Grier in the amount of $27,500.

On August 15, 1997, a panel of the Court of Appeals affirmed the determination of the trial court granting judgment as a matter of law to defendant Titan on Ms. Grier's constructive discharge and punitive damages claims. Ms. Grier's timely petition for rehearing and suggestion for rehearing en banc was denied. This petition for certiorari follows.

REASONS FOR GRANTING THE WRIT

In the Fourth Circuit, the right to a jury trial in civil rights cases is seriously in jeopardy.[1] In this case, the trial judge set aside the two separate verdicts of two separate, properly-instructed juries, each of which held in favor of Ms. Grier.

Moreover, these verdicts were set aside based on a reading of Title VII and the Civil Rights Act of 1991 which is seriously at variance from the resolution of the same issues by other Circuits. Ms. Grier suffered from intentional retaliation for her activity protected under Title VII. Both juries so concluded and

---

1. *See also* the petitions for certiorari in *Gill v. System Planning Corp.* and *Hetzel v. County of Prince William, et al.*, filed concurrently with the instant petition, in which the Fourth Circuit also rejected the properly-instructed juries' assessment of damages and liability in employment related civil rights cases.

— with respect to that finding at least — the district court and Court of Appeals agreed. Yet every other Circuit to consider the issue has concluded, quite reasonably, that a finding of "intentional unlawful retaliation" permits (although it does not compel) a finding of "reckless indifference" sufficient to support an award of punitive damages. The opinion of the Fourth Circuit in this case does not even mention, much less resolve, the conflict between the holding here and every other Circuit.

Moreover, although this Court has not had occasion to address this issue under Title VII and Section 1981a, this Court has addressed the precisely analogous issue under 42 U.S.C. § 1981 — and resolved that question in a manner exactly opposite of the way in which the Fourth Circuit acted here.

This Court should grant the petition for certiorari to resolve this direct conflict among the various Courts of Appeals as to the construction and interpretation of the nation's preeminent civil rights statute.

I.

IN OPPOSITION TO EVERY OTHER CIRCUIT, THE COURT OF APPEALS IN THIS CASE HELD THAT A FINDING OF INTENTIONAL, UNLAWFUL RETALIATION IS NOT SUFFICIENT TO PERMIT A JURY TO FIND "RECKLESS DISREGARD" OF A PLAINTIFF'S RIGHTS, AND TO IMPOSE PUNITIVE DAMAGES.

Although punitive damages have been awardable under Title VII of the Civil Rights Act only since November of 1991, the standard chosen by Congress for the imposition of punitive damages has long been familiar in cases decided under 42 U.S.C. § 1981.

Titan intentionally retaliated against Ms. Grier for her legally-protected activity in complaining of discrimination by Titan. Two juries reached this conclusion; the district court refused to disturb the finding of the second jury, and the panel opinion affirmed that determination. The issue of whether Titan intentionally, unlawfully retaliated is no longer open to question: it did.

The trial court, however, set aside the punitive damage award because there was no evidence **other** than this intentional retaliation which demonstrated the "reckless indifference" required by statute. (This itself is factually incorrect, as Titan's response to Ms. Grier's complaints — "bullshit," "troublemaker," and even worse terms — indicates.) As the Court of Appeals put it:

> [T]here was no evidence — **beyond that required to show that Titan had intentionally retaliated against Grier** — to demonstrate that Titan had acted with "reckless indifference" to Grier's federally-protected rights. Reasoning that "the 'reckless indifference' standard for awarding punitive damages must require more than a showing of intentional retaliation" to avoid making punitive damages available in all retaliation cases, the district court granted judgment as a matter of law on Grier's punitive damage claim as well.

Slip Op. at 5 (citations to district court memorandum omitted) (emphasis added). The Court of Appeals neither distinguished, discussed, or even cited to the contrary authority existing in other circuits — or the decision of this Court in *Smith v. Wade*, 461 U.S. 30, 56, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983).

Distilled to its essence, Ms. Grier's argument is this: intentional, knowing retaliation against someone for asserting federally-protected rights is recklessly indifferent to a plaintiff's federally protected right to complain of unlawful discrimination and retaliation.

In other words, and as every other Circuit to address the issue has concluded, under Title VII of the Civil Rights Act and 42 U.S.C. § 1981a, punitive damages are inherent in the jury's finding of unlawful, intentional retaliation. *See generally Williamson v. Handy Button Machine Co.*, 817 F.2d 1290, 1296 (7th Cir. 1987) (noting that punitive damages may be appropriate at same threshold as finding of liability in discriminatory discharge case because of the "clarity of the rule" against racial discrimination in employment).

The appellate court's holding on this issue (which simply adopted the reasoning of the district court) rejected this proposition because it collapses the standard for proving punitive damage liability into the same standard as for proving liability in the first place. However, a jury always retains the discretion not to award punitive damages, even in cases of intentional retaliation. In the identical area of liability under 42 U.S.C. § 1983, this Court has expressly rejected the proposition that the deterrent and punishment purposes of punitive damages are served only if the threshold for punitive liability is higher than the threshold for underlying liability. *Smith v. Wade*, 461 U.S. 30, 56, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983). *See Vasbinder v. Ambach*, 926 F.2d 1333, 1343 (2d Cir. 1991) (noting in Section 1983 retaliatory discharge case that threshold for imposition of punitive damages and for imposition of liability generally may be identical).

The Courts of Appeals for the First, Seventh, and District of Columbia Circuits have each authoritatively rejected the reasoning employed by the appellate and the trial court in this

case. In discussing the rationale for its decision in *Handy Button Machine*, the authority relied upon by Ms. Grier in the trial and appellate court, the Court of Appeals for the Seventh Circuit recently explained:

> "Evidence that suffices to establish an intentional violation of protected civil rights also may suffice to permit the (factfinder) to award punitive damages, provided the (court), in its discretionary moral judgment, finds that the conduct merits a punitive award. **No additional evidence (of reckless indifference) is needed.**" *Barbour v. Merrill*, 310 U.S. App. D.C. 419, 48 F.3d 1270, 1277 (D.C. Cir. 1995) [citations omitted]. . . .
>
> [The employer] protests that this amounts to an automatic imposition of punitive damages upon the trial court's finding of intentional discrimination. [However, p]unitive damages are never awarded as a matter of right; the finder of fact, after reviewing the entire record, is called upon to make a "moral judgment" that the unlawful conduct warrants such an award to punish the wrongdoer and deter others. *Smith v. Wade*, [*supra*,] 461 U.S. at 52; *Barbour*, 48 F.3d at 1277. . . . That is precisely the sort of judgment peculiarly within the province of the finder of fact. . . .

Merriewether v. Family Dollar Stores of Indiana, Inc., 103 F.3d 576, 581-82 (7th Cir. 1996) (emphasis added) (citations omitted). More recently, the Court of Appeals for the District of Columbia Circuit reached the same conclusion in *Kolstad v. American Dental Association*, 108 F.3d 1431 (D.C. Cir. 1997). In *Kolstad*, the district court — as here — properly concluded that the evidence supported the jury's finding of intentional unlawful

conduct. 108 F.3d at 1436-37. The district court also — as here — concluded that the absence of evidence **in addition to** evidence of the underlying violation precluded an award of punitive damages. This, the Court of Appeals held, was error:

> [The employer] argues that Congress intended Title VII plaintiffs to recover punitive damages only in "extraordinarily egregious cases," suggesting that the quantum of proof necessary to sustain such an award is greater than courts have traditionally required. . . . In response, [employee] points to legislative history expressly contradicting this assertion. . . . Decisive to us, however, is Section 1981a's plain language, which tracks the standard that courts had previously established for the proof required to sustain awards of punitive damages under other federal civil rights statutes. *See Smith v. Wade*, [*supra*] . . . ; *Williamson v. Handy Button Machine*, [*supra*]. . . . [W]e hold that the standard of proof required to sustain awards of punitive damages under 42 U.S.C. § 1981a is the same as that previously established for punitive awards under 42 U.S.C. §§ 1981 and 1983.
>
> As both the Supreme Court and this court have explained, "**evidence that suffices to establish an intentional violation of protected civil rights also may suffice to permit the jury to award punitive damages**, provided that the jury, in its 'discretionary moral judgment,' finds that the conduct merits a punitive award." . . . **In such cases, "no additional evidence is required". . . because "the state of mind necessary to trigger liability for the wrong is at least as culpable as that required to make punitive damages applicable."** . . . Having concluded that the jury could reasonably find from the evidence that

> [the employer] intentionally discriminated against [the employee], the district court should have instructed the jury that upon the requisite finding — malice of reckless indifference to [the employee's] rights — it could consider a punitive award. **The evidentiary threshold having been reached, discretion to award punitive damages, within the limits set by statute, lay with a properly instructed jury, not the court.**

108 F.3d at 1437-38 (emphasis added) (citations omitted). In so concluding, Judge Tatel relied in part on an earlier decision from the Court of Appeals for the First Circuit, establishing the same principle under 42 U.S.C. § 1981. *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194 (1st Cir. 1987). As that Court explained, this standard "does not mean that punitive damages are appropriate in every case of an intentional wrong, but rather that in each case the trier of fact has the discretion to determine whether punitive damages are necessary." 832 F.2d at 205. Requiring "something more than intentional discrimination" or "a requirement of aggravating circumstances" would "improperly restrain the trier of fact" and be inconsistent with *Smith v. Wade*, *supra*. 832 F.2d at 205-06.

By permitting the punitive damages award to be vacated based on the supposed absence of evidence **in addition to** that of intentional, unlawful retaliation, the Court of Appeals in this case departed from the teaching of this Court in *Smith*, from the plain meaning of the statute, and from the road taken by every other Circuit Court of Appeals to have considered the issue. Under these circumstances, it would be appropriate for this Court to grant this petition for writ of certiorari.

II.

THE COURT OF APPEALS APPLIED AN UNDULY RESTRICTIVE STANDARD FOR DETERMINING CONSTRUCTIVE DISCHARGE, IN CONFLICT WITH DECISIONS FROM OTHER COURTS OF APPEALS AND EARLIER DECISIONS FROM THE FOURTH CIRCUIT ITSELF.

A. Ms. Grier Was Given "No Choice" But To Resign

The evidence at the second trial demonstrated conclusively that Ms. Grier was excluded from the development of strategic and operating plans for 1995, even though the coordination of these plans was one of her primary responsibilities. J.A. at 5045. Ms. Grier was denied even the most basic computer equipment, which rendered her incapable of doing meaningful work in her area of expertise. J.A. at 5068. Credit for work performed by Ms. Grier was taken from her and given to others. J.A. at 5033-35; 5070-71. By the end of October, Ms. Grier's work had essentially all been taken from her. J.A. at 5031, 5078, 5206-07. Ms. Grier asked for work, and was given none in response. J.A. at 5032, 5078. She was relieved of her responsibilities as deputy general manager. J.A. at 4881-82. Ms. Grier was relieved from her position as UEP Project manager, a move that significantly contributed to her decision to resign. J.A. at 5039, 5093. She was removed from work on the AFCIMS project, which she had originated. J.A. at 4895-96.

Moreover, Ms. Grier was denied almost $50,000 in various compensation incentives which she had earned — enough, one would surmise, to make the most reasonable employee feel that his future with the company was not viable and that he was being forced to leave. *See, e.g., Amirmokri v. Baltimore Gas & Electric Co.*, 60 F.3d 1126, 1129 (4th Cir. 1995) (employee who

was treated rudely and embarrassed in public, and denied benefits "like meal money" held to have stated a claim for constructive discharge).

This is sufficient evidence — evidence absent from the opinion of the appellate court — to support a claim of constructive discharge. Yet in addition, Ms. Grier was given literally "no choice" but to leave: she was told she could resign immediately and accept a severance package, or resign as soon as she found another job; but the choice of staying with Titan (and certainly, the choice of staying a Titan supervisor) was not present. The president of Titan agreed that the "choice" Titan offered to Ms. Grier "was not a real job." J.A. at 5111. The two juries' independent conclusions that Ms. Grier had no choice but to resign should not have been set aside.

B. The Court of Appeals Applies An Impossibly Restrictive Standard for Proof of Constructive Discharge, In Conflict with Earlier Decisions from That Court And From Other Courts of Appeals.

Beginning with *Paroline v. Unisys Corp.*, 879 F.2d 100, 105 (4th Cir. 1989), *dissenting opinion adopted in part*, 900 F.3d 27 (1990) (en banc), the Court of Appeals for the Fourth Circuit has held that a constructive discharge plaintiff under Title VII must demonstrate that her working conditions were objectively intolerable, that is, that a reasonable person in her position would have felt compelled to resign.

In the past three years, however, a series of panel opinions in the Fourth Circuit have transformed the burden to an impossible one to meet: that a plaintiff must prove that she had literally "no choice but to resign." *See, e.g., Blistein v. St. John's College*, 74 F.3d 1459, 1468 (4th Cir. 1996), relied upon by the appellate and trial courts in this case.

This impossibly-high standard makes the remedy the Civil Rights Act affords to persons forced to leave a job utterly meaningless: no other Court of Appeals has raised the bar so high; no other Court of Appeals has established such an internally inconsistent standard. An employee almost **always** has **some** choice: the choice to stay employed and be raped, for example, is still a "choice." *Cf. Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343 (4th Cir. 1995). Indeed, earlier precedent from the Fourth Circuit confirms that an employee in Ms. Grier's situation may be found by a trier of fact to have been constructively discharged: if the employee is "treated rudely" and her complaints of discrimination are met in a "condescending and abusive manner," *Brown v. Eckerd Drugs, Inc.*, 663 F.2d 1268, 1274 (4th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128, 102 S. Ct. 2952, 73 L. Ed. 2d 1345 (1982), as surely happened here — Ms. Grier was branded not only a "troublemaker" for her "bullshit" complaints but (in testimony excluded by the trial court) a "bitch" and a "cunt" for complaining of discrimination J.A. 465-69, 497 — a jury may find a constructive discharge. If the employee is confronted with "unreasonably harsh conditions, in excess of those faced by [her] co-workers," *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1254 (4th Cir. 1985), *cert. denied*, 475 U.S. 1082, 106 S. Ct. 1461, 89 L. Ed. 2d 718 (1986), or "singled out for any unique treatment," *Bristow*, 770 F.2d at 1256, the jury may find a constructive discharge. Where an employee is denied equal status with her coworkers and her shift is changed to accommodate others, a constructive discharge may be found. *Holsey v. Armour & Co.*, 743 F.2d 199, 209 (4th Cir. 1984), *cert. denied*, 470 U.S. 1028, 105 S. Ct. 1395, 84 L. Ed. 2d 784 (1985). Where an employee is assigned duties which were not assigned to non-protected individuals at his level, constructive discharge liability may lie. *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326, 339 (4th Cir. 1983), *cert. denied*, 466 U.S. 951, 104 S. Ct. 2154, 80 L. Ed. 2d 539 (1984). In Ms. Grier's case, these and more severe elements are present beyond question,

and two separate juries found a constructive discharge had occurred.

Yet the Court of Appeals found that Ms. Grier had a "choice" not to resign — the choice to remain in a meaningless position at a hostile employer where her main nemesis, the subject of her discrimination complaints, was to be treated as "God" — and affirmed entry of judgment against her without distinguishing or even discussing its own precedent such as *Bristow*, *Brown*, *Holsey*, *Lilly*, or even the "intolerability" elements of *Paroline*. (The panel opinion also incorrectly suggests that "there was no evidence" that Titan's actions were "targeted to compel Grier to resign." Slip Op. at 4 n.2. There is no question but that the evidence was sufficient to show Titan intended to force Ms. Grier to resign; the trial court held the evidence to be sufficient, J.A. at 4197b, and Titan did not appeal that determination.)

A survey of the law of other Circuits confirms that Ms. Grier was constructively discharged, despite the illusory "choice" she — and every employee — retains. The Court of Appeals for the Tenth Circuit recently wrote that "an employee can prove a constructive discharge by showing that she was faced with a choice between resigning or being fired." *Burks v. Oklahoma Publishing Co.*, 81 F.3d 975, 978 (10th Cir. 1996), citing *Acrey v. American Sheep Industry Association*, 981 F.2d 1569, 1573-74 (10th Cir. 1992). *See, e.g., Maschuka v. Genuine Parts Co.*, __ F.3d __, 1997 U.S. App. LEXIS 21132 (8th Cir. Aug. 11, 1997) (employee asked to stay on in lower paying position states claim for constructive discharge); *Equal Employment Opportunity Commission v. Massey Yardey Chrysler Plymouth, Inc.*, 117 F.3d 1244 (11th Cir. 1997) (employee who sees employer advertise for replacement, and who is denied raise, states claim for constructive discharge); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 574 (8th Cir. 1997) ("if an employee

quits because she reasonably believes there is no chance for fair treatment, there has been a constructive discharge"); *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061 (3d Cir. 1996) (reversing judgment for defendant as a matter of law) (where employee suffers no decrease in salary, but is transferred to a non-supervisory position, constructive discharge claim has been stated).

After the second trial in this case, the jury answered two specific interrogatories:

> Do you find by a preponderance of the evidence that plaintiff's work environment was so objectively intolerable that a reasonable person would feel compelled to resign; that is, that he or she would have no choice but to resign?

The jury answered, "Yes." J.A. at 6601-02.

> Do you find, by a preponderance of the evidence, that defendant deliberately made plaintiff's work environment objectively intolerable, in retaliation for plaintiff's engaging in protected activity?

The jury again answered, "Yes." J.A. at 6602. In any other Circuit (or, indeed, in the Fourth Circuit just a few years ago) Ms. Grier's constructive discharge jury verdicts would have been affirmed without comment. The drift in the Fourth Circuit's recent decisions toward a semantically-contentless and internally-inconsistent "no choice" standard has severely handicapped the enforcement of the Civil Rights Act in the states comprising the Fourth Circuit.

This drift also has created a perverse incentive for employers to make life a living hell for employees such as Ms. Grier,

"troublemakers" because they demand adherence to law, all the while knowing that Ms. Grier can always exercise her "choice" to endure horrific conditions, thus immunizing the employer from liability under Title VII.

This Court has never addressed the proper standard to be met by a constructive discharge plaintiff under Title VII. It would be appropriate for this Court to grant this petition for certiorari to resolve this important issue, as to which the various Courts of Appeals have reached sharply differing results.

CONCLUSION

Petitioner Celindah Grier prays that this Court grant this Petition and issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this matter.

Dated: December 8, 1997

Respectfully submitted,

JOHN M. BREDEHOFT
Counsel of Record
ELAINE C. BREDEHOFT
LINDA M. JACKSON
CHARLSON & BREDEHOFT, P.C.
Attorneys for Petitioner
11260 Roger Bacon Drive
Suite 201
Reston, Virginia 20190
(703) 318-6800

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ARGUED JULY 7, 1997

UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 97-1167

CELINDAH J. GRIER,

Plaintiff-Appellant,

v.

THE TITAN CORPORATION,

Defendant-Appellee.

No. 97-1168

CELINDAH J. GRIER,

Plaintiff-Appellee,

v.

THE TITAN CORPORATION,

Defendant-Appellant.

Appendix A

Appeals from the United States District Court
for the Eastern District of Virginia, at Alexandria.
T.S. Ellis, III, District Judge; Albert V. Bryan, Jr.,
Senior District Judge.
(CA-95-900-A)

Argued: July 7, 1997

Decided: August 15, 1997

Before LUTTIG and WILLIAMS, Circuit Judges, and
Joseph F. ANDERSON, Jr., United States District Judge for
the District of South Carolina, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: John Michael Bredehoft, CHARLSON & BREDEHOFT, P.C., Reston, Virginia, for Appellant. K. Stewart Evans, Jr., MCGUIRE, WOODS, BATTLE & BOOTHE, L.L.P., Washington, D.C., for Appellee. **ON BRIEF:** Elaine C. Bredehoft, CHARLSON & BREDEHOFT, P.C., Reston, Virginia, for Appellant. John J. Michels, Jr., MCGUIRE, WOODS, BATTLE & BOOTHE, L.L.P., McLean, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.
See Local Rule 36(c).

Appendix A

OPINION

PER CURIAM:

Appellant, Celindah Grier, brought Title VII claims for constructive discharge and retaliation against her former employer, Titan Corporation. The claims were tried to a jury twice. The first jury awarded Grier both compensatory and punitive damages on her claims. Subsequently, the district court granted Titan's Rule 59 motion for a new trial on Grier's Title VII retaliation and constructive discharge claims, ruling that the jury's verdict was against the clear weight of the evidence.[1] Grier's claims were then tried to a second jury, which also returned a verdict for compensatory and punitive damages on both Grier's retaliation claim and her constructive discharge claim. The district court then entered judgment as a matter of law under Rule 50 for Titan on the constructive discharge claim and on the punitive damages award. The district court denied Titan's motion for judgment as a matter of law on Grier's retaliation claim, and also denied Titan's motion for a new trial.

This appeal followed. Grier appeals the trial court's grant of a new trial after the first trial; she also appeals from the district court's grant of judgment as a matter of law on her constructive discharge claim and punitive damages award after the jury verdict in the second trial. Titan cross appeals the court's denial of its Rule 50 motion on Grier's retaliation claim following the second trial.

---

1. The district court also granted Titan's motion for judgment as a matter of law on Grier's claim for constructive discharge under Virginia law. Relying on our decision in *Hairston v. Multi-Channel TV Cable Co.*, 1996 WL 119916 (4th Cir. March 19, 1996) (per curiam), the court held that Virginia common law provided no such cause of action.

Appendix A

The district court granted judgment as a matter of law on Grier's constructive discharge claim because it concluded that, although "the record may be adequate for a reasonable trier of fact to find that defendant deliberately intended to force plaintiff to resign, it does not allow a reasonable trier of fact to conclude that plaintiff's work environment was objectively intolerable." District Court Order of Dec. 24, 1996, at 4. Grier's evidence demonstrated that her working conditions "may have been unpleasant and even subjectively intolerable," *id.* at 10, but did not — as required to prove constructive discharge — leave her "no choice but to resign." *Id.* at 4 (quoting *Blistein v. St. John's College*, 74 F.3d 1459, 1468 (4th Cir. 1996)).

Specifically, the district court found that any reduction in Grier's work opportunities "was not only prospectively temporary, but also quite brief." *Id.* at 7. Additionally, Grier's "chief reason for leaving" — Titan's failure to address both Grier's claims of retaliation and her underlying claims of gender discrimination — did not evidence an objectively intolerable environment. Rather, said the district court, Grier was attempting to "bootstrap tolerable conditions into an intolerable working environment by claiming that [the] employer responded inadequately to complaints concerning the tolerable workplace."[2] *Id.* at 8. Nevertheless, the district court also found that there

---

2. Moreover, we note that there was no evidence that Titan's failure to respond to Grier's underlying claims of gender discrimination was a targeted attempt to compel Grier to resign. *Cf. Paroline v. Unisys Corp.*, 879 F.2d 100, 114 (4th Cir. 1989) (Wilkinson, J., concurring in part and dissenting in part) ("Although a failure to act in the face of known intolerable conditions may create an inference that the employer was attempting to force the plaintiff to resign, such an inference depends upon some evidence that the inaction of the employer was directed *at the plaintiff*.") (emphasis in original), *adopted by* 900 F.2d 27, 28 (4th Cir. 1990) (en banc) (per curiam).

was sufficient evidence for the jury to find that Titan had taken retaliatory measures against Grier, even though those actions — taken together — did not create an objectively intolerable workplace.

As to the punitive damages award, the district court held that there was "no evidence in the record that any retaliatory acts by defendant were conducted with malice, ill-will, spite or hatred." *Id.* at 11. Moreover, there was no evidence — beyond that required to show that Titan had intentionally retaliated against Grier— to demonstrate that Titan acted with "reckless indifference" to Grier's federally protected rights. *Id.* at 10-11. Reasoning that "the 'reckless indifference' standard for awarding punitive damages must require more than a showing of intentional retaliation" to avoid making punitive damages available in all retaliation cases, the district court granted judgment as a matter of law on Grier's punitive damage claim as well. *Id.* at 12.

In sum, after presiding over two complete jury trials of Grier's retaliation and constructive discharge claims, the district court was convinced that there was insufficient evidence to support Grier's constructive discharge claim and her punitive damage award. Of course, the fact that two successive juries found in Grier's favor counsels caution in setting aside the second jury's verdict as unsupported by the evidence. *See Massey-Ferguson Credit Corp. v. Webber,* 841 F.2d 1245, 1250 (4th Cir. 1988). However, the district court was quite clear on the record below that it allowed Grier's claims to go to the jury the second time, not because it believed there was sufficient evidence to support them, but because it was concerned that this court would apply more lenient standards for constructive discharge and punitive damages. Thus, the district court allowed

the case to go to the jury so that there would be no need for a new trial if we disagreed with the court as to the proper standards to be applied to Grier's claims. JA at 6605, 6637.

Having reviewed the record, the arguments and briefs of counsel, and the order of the district court, we believe that the district court correctly applied the proper standards in this case, and we affirm on the reasoning of the district court.[3]

AFFIRMED

---

3. It is far from clear that the district court's grant of a new trial after the first jury trial is reviewable by us at this time. However, even assuming that the grant of the new trial is now reviewable, the district court did not abuse its discretion in concluding that the first jury's verdict was against the clear weight of the evidence, and thus, that a new trial should be ordered. Because the records in the first and second trials were so similar and because the grant of a new trial is reviewed for abuse of discretion — rather than de novo as is the grant of judgment as a matter of law — our holding that the defendant was entitled to judgment as a matter of law on the constructive discharge claim after the second trial means, *a fortiori*, that the district court did not abuse its discretion in granting a new trial after the first trial based on the same concerns about the sufficiency of the evidence. Of course, the district court granted a new trial on the retaliation claims after the first trial, but refused Titan's request for judgment as a matter of law on that claim after the second trial. We are satisfied, however, that while the evidence of retaliation is enough to sustain a jury verdict, it is weak enough that a judge could find that such a verdict was against the weight of the evidence and order a new trial.

APPENDIX B — TRANSCRIPT OF PROCEEDINGS DATED JANUARY 3, 1997

[1] IN UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No.
95-900

SELINDA J. GRIER,

Plaintiff,

Versus

TITAN CORPORATION,

Defendant.

Alexandria, Virginia
Friday, January 3, 1997

The above-entitled matter came on to be heard before the Honorable T.S. Ellis, III, a Judge in and for the United States District Court, Eastern District of Virginia, in Courtroom 700, United States District Courthouse, 401 Courthouse Square, Alexandria, Virginia 22314, beginning at 11:00 o'clock a.m., before Tabitha R. Hopchas, a Verbatim Court Reporter, when there were present on behalf of the respective parties:

Appendix B

[2] APPEARANCES:

On behalf of the Plaintiff:

ELAINE CHARLSON BREDEHOFT,
ATTORNEY AT LAW
Charlson & Bredehoft, P.C.
11260 Roger Bacon Drive
Suite 201
Reston, Virginia 20190

On behalf of the Defendant:

STEWART K. EVANS, JR., ESQUIRE
McGuire, Woods, Battle & Boothe, L.L.P.
8280 Greensboro Drive
Suite 900
McLean, Virginia 22102-3892

CONTENTS

Proceedings Page 3

[3] PROCEEDINGS

THE COURT: All right, you may call the next matter.

THE CLERK: Civil Action 95-900 Selinda J. Grier versus Titan Corporation.

MS. BREDEHOFT: Good morning, Your Honor, Elaine Bredehoft representing the Plaintiff, Selinda Grier.

Appendix B

MR. EVANS: Stewart Evans, Your Honor, on behalf of Titan Corporation.

THE COURT: All right. The matter is before the Court on a number of motions, and the parties have submitted fairly extensive briefs on them, which the Court has reviewed and I'm fairly familiar with this matter.

What I'm going to do is to tell you what the Court's rulings are on this matter, and I'll give you an opportunity to address it. But I don't want a repeat of all of the briefs and everything. I think a great deal has been argued.

First, there is a renewed motion for judgment as a matter of law pursuant to Rule 50 by the Defendant on the Plaintiff's claim that the Defendant [4] retaliated against her after September 29th. There is also Defendant's motion for new trial pursuant to Rule 59; there's Plaintiff's motion to alter and amend the judgment to reinstate punitive damages; and there's Plaintiff's motion for attorney's fees and costs.

First of all, for the reasons that were stated from the bench and in the previous order, the motion for judgment as a matter of law has been denied in part and granted in part.

All that I have read since then does not move me to change any of that, which is to say that the Defendant's renewed motion for judgment as a matter of law on Plaintiff's claim that Defendant retaliated against her after September 29, 1994, I'm not persuaded by that. I've read it pretty carefully and thought about it.

Next there is a motion for a new trial. This raises some new

issues. First, however, the principles that govern are well-settled. Trial judges may grant new trials when it's in the interest of justice to do so, if the damages are excessive or manifestly against the weight of the evidence or the like.

However — and I did grant a new trial [5] after the first trial of this matter, because I found that the verdict was against the manifest weight of the evidence. I also felt as I indicated at the time that I was concerned about other matters in the course of that trial. There were some arguments that I was concerned about that the Plaintiff made to the jury. That didn't occur in the second case.

The Fourth Circuit has stated that it's within the trial court's authority to set aside successive verdicts as excessive or against the weight of the evidence. This would be a successive verdict.

The Fourth Circuit has also made clear, sensibly, I think, that that power should be exercised only in the most exceptional cases. When two juries reach substantially the same result as occurred here, the possibility of a miscarriage of justice is not great. That's the Massey-Ferguson case that I've paraphrased.

Those principles, if they're applied here, compel the Court to reach the conclusion that this is not an occasion of warranting the grant of a new trial. There were a number of points raised that were not raised in the previous case. For example, the Plaintiff on numerous occasions said oh, I'm not supposed to say that, [6] or something of that sort. The Plaintiff of course points out that there were no objections to those.

Several times I considered a sui sponte objection or indication that the jury should not regard — should disregard

that, but that it would only call attention to it. Several times I expressed to counsel that if they proceed down that line that the jury should be told that a previous jury found there was no merit to the equal pay claim.

But of course, I think one jury or one case did result in a verdict for another of the Plaintiffs. Am I wrong about that, Ms. Bredehoft; was there another verdict?

MS. BREDEHOFT: Yes, Your Honor.

THE COURT: All right, there was another verdict, and maybe that would be one of the cases in which she assisted; is that right, Ms. Bredehoft?

MS. BREDEHOFT: That's correct, she was a witness in the case.

THE COURT: So I think the Court's ruling that none of that was relevant to this case was entirely correct, and it may be that the Plaintiffs references to that were deliberately contrived. I didn't — I don't [7] think they were deliberately contrived. I think it was a bit of theater. Some folks are more dramatic than others, and it's — appropriately that shouldn't happen. It did happen, there was no objection made. I don't think that it calls for a new trial. It certainly isn't something that should have occurred, but I don't think it is so egregious as to call for a new trial.

Certainly the conduct of Plaintiff's counsel was different this time, I thought, and I thought the — I thought, Ms. Bredehoft, I don't even recall any compound questions this time, and certainly in closing arguments I didn't hear any of the other matter, so I don't think this case is infected as the others.

Appendix B

The Court granted a motion for judgment as a matter of law on the constructive discharge and punitive damages, and I think it is fair to say that the constructive discharge area could tolerate some clarification, and the Court may well be wrong in that regard, in which case the Plaintiff has a verdict now, and there would be no need to retry it. Which is why I did it the way I did it. And the punitive damage, the point is the same.

Plaintiff has a verdict, and if the [8] Court's mistaken in that regard then it need not be retried. The Plaintiff simply will have recovered. But I'm persuaded that a new trial is not appropriate as a successive case.

Finally, I'm also persuaded that the motion for attorney's fees and costs as the parties seem to agree would be appropriate to defer until resolution of several issues on appeal is reached. So I'm inclined to defer that motion.

Now, I didn't address every single point raised, but I don't have any doubt that I considered all of the points. I'll give you each now an opportunity with respect to the motions that I've indicated what I'm going to rule on to see if there's something I have missed that you think is significant.

All right, Ms. Bredehoft, I'll let you go first.

MS. BREDEHOFT: Your Honor, the only thing that I would like to address is our motion to alter-amend. I recognize that we filed our motion before Your Honor issued the order which addressed Your Honor's view on punitive damages. The only thing — and I don't want to be redundant or repetitive, and it's correct, Your [9] Honor, we've been through this many times.

Appendix B

The only thing I would like to say is that I think the finding on the verdict form which very specifically made the jury find intentional retaliation of Ms. Grier has to be at least equal to a reckless disregard or reckless indifference, and that's why we'd urge the Court to reconsider on the punitive damages.

I think the evidence of Ms. Grier being a troublemaker which I elicited from Cheryl Sunden was because of her complaints of discrimination is malice, ill-will, as well as —

THE COURT: Now you're repeating everything. I've read all this.

MS. BREDEHOFT: All right, that's fine, Your Honor, I have nothing further.

THE COURT: The way it's structured, Ms. Bredehoft, is that your victory is — with the jury can be recovered —

MS. BREDEHOFT: Resurrected.

THE COURT: — resurrected up there. I did it specifically for that reason, and I made clear what my reasons were for making a judgment as a matter of law.

[10] MS. BREDEHOFT: Thank you, Your Honor.

THE COURT: All right, Mr. Evans?

MR. EVANS: Your Honor, very briefly, as I indicated to you before the case was submitted to the jury, submitting the issue of punitive damages to the jury would substantially prejudice my client because there was no evidence to support that, and I think you even may have —

THE COURT: Well, I certainly felt —

MR. EVANS: — stated that.

THE COURT: — that way, and that's why I granted the motion for judgment as a matter of law. But I may be mistaken in the standard, and if Ms. Bredehoft can persuade the Fourth Circuit as to a standard that's different from the standard that I apply, then she's entitled to have that verdict and not to have to retry the case yet a third time.

MR. EVANS: I understand that, Your Honor, and I understand your motivation. I'm just for the record stating obviously that I disagree as I did during the trial, and I think I said then that it may affect the jury's view of liability —

THE COURT: Well, I understood the dynamic [11] then and I understand it now, but it's an imperfect world.

MR. EVANS: I understand, Your Honor, and let me also say that with respect to the conduct of counsel, I agree that there were no — actually I think there was one compound question, but that was not a problem. But what was a problem was the constant requirement imposed upon me by Ms. Bredehoft seemingly not listening to the Court's rulings and following the rulings, to over and over and over again object.

And as Your Honor pointed out, it's worse in a situation like that when the Plaintiff testifying on the stand puts her hands on either side of her face and says oh, well, let me make sure that I don't say something I'm not supposed to say. And —

THE COURT: I recall that vividly, and as I say, that was

— I think it was inadvertent. It was theater in any event, but some people are more histrionic than others, and we expect juries to exercise some judgment about that, and your concern that they were as you would see it taken in by it —

MR. EVANS: No, Your Honor, that's not my — let me tell you what my concern is, and I think [12] it's a very valid and real one.

In an ordinary case if a witness did that, I would agree with you, Your Honor, but this is not an ordinary case. This is a case in which there were six objections sustained in opening statement, and which Your Honor sui sponte called Plaintiff's counsel to the bench in opening statement.

And time and time and time again, the Court would make a ruling and would have to rehash rulings made prior to the beginning of the trial. And the same information kept coming out, and Ms. Bredehoft would say — she was standing there like this, and she would say, with her arms crossed, she said now, let me make sure that I ask this question right and don't say something improper. Then a witness would give it back to her, it happened at least twice the witness did this, with her hands on her face.

My point is this: The jury had to have come to believe that it was something really bad going on, but for reasons they didn't understand nobody would let the Plaintiff or Plaintiff's counsel talk about them. And that's what has corrupted this jury, and that's why you should set it aside, because that in combination of [13] sending the punitive damages issue to the jury — you should have seen the jury's face when Your Honor read the stipulations, the net worth of my client. That was dramatic. You may not have noticed it, but I did. It was dramatic.

They went in the jury room and they wanted to punish Titan for something they didn't understand, felt like we, maybe all of us, were hiding from them. But that was a clear signal, and that's what happened in this case, and that's why it so terribly prejudiced my client.

And let me say one other thing about the verdict itself. Absolutely no evidence to support the verdict from a point of view of emotional distress. To me the jury's finding that there was no retaliation before the 29th completely eliminated that whole cause of action.

And as regards the compensation issue, Your Honor gave a jury instruction which required the jury to find the negative. And I think you did so properly in the context of this case, because of the issues involving the failure to address all the other things we've talked about in the equal pay issue.

[14] This case clearly started out as an equal pay claim even in this Court, even in this case we just tried. All you have to do is read the Plaintiff's counsel's opening statement. It ended up as something else, something we promised or acknowledged certain sums of money were do, and the issue was before the jury, can we find that there was no other reason other than retaliation to deny the payment of those sums.

I think that's the effect of your instruction, Your Honor, and clearly the evidence was overwhelming that there was other reason. And that it was in the context of the settlement discussion, it went right up to the last day and Ms. Grier made a conscious decision not to take the settlement because she didn't want to sign the release, which was her right to do.

But for those reasons, Your Honor, you should set aside

this judgment. And I understand it's going to be inconvenient, and I understand it may take up some more judicial resources, but that's the only fair result to my client. And we are prepared to come in here and try this case again, focus on the period of September 29 and afterwards, that's what we have to do. And when we do that and we don't have the problem of having to [15] object over and over and over again, we will win the case in front of a jury.

And Your Honor, let me just say one other thing. You will recall, I think, that I made objections, and I don't know what you were thinking, but I sort of read your body language on a couple of those occasions, a number of those occasions, and you would say, well, Mr. Evans, I'm going to let it in. And I think — I interpreted what you were doing at that time not to be improper necessarily, because it's your discretion, but to be almost as something out of exasperation.

You will let it all in, it may not in your opinion be something which is going to be weighty in terms of the jury decision, but just let it in, it all came in. And that's — and I'm not complaining about that except to make the observation that that was all part of the dynamics that went on in this courtroom to remind you of that, to emphasize that my client was severely prejudiced by me having to stand up and over and over and over again, object.

And for those reasons, Your Honor, I would ask that you reconsider your Rule 59 and grant a new trial, because that would be the only fair result.

[16] Thank you.

THE COURT: Well, to the extent the Court made any

evidentiary rulings that you disagree with, Mr. Evans, you can appeal those. That's the short answer to your observation about the Court's permitting evidence and communicating anything to you or to anyone else by way of body language, you can also object to the Court's body language, although it might be the first.

I considered carefully the matter that you raised about the objections. I remembered them vividly. To put the point simply, there is no question that some of that theatrics may have infected the case, but I do not believe under the Rule 59 standard that it warrants a new trial.

No trial is perfect. All trials are imperfect. And in the Court's view, exercising its discretion, this one was not so imperfect as to require a new trial, a successive new trial.

So the motion for Defendant's renewed motion for judgment as a matter of law pursuant to Rule 50 is denied. A new trial under Rule 59 is denied. The motion to alter or amend judgment to reinstate punitive damages by the Plaintiff is denied. And the motion for [17] attorneys' fees and costs is deferred pending resolution of all these issues on appeal.

I thank counsel for their cooperation in this matter.

Call the next case.

(Whereupon, at approximately 10:20 o'clock, a.m., the hearing in the above-entitled matter was concluded.)

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION FILED DECEMBER 24, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 95-900-A

CELINDAH GRIER,

Plaintiff,

v.

TITAN CORPORATION,

Defendant.

ORDER

This matter was tried before a jury from November 25 to December 5, 1996. At the close of plaintiff's evidence, defendant made a motion for judgment as a matter of law pursuant to Rule 50, Fed. R. Civ. P. Specifically, defendant moved for judgment as a matter of law with respect to (1) the claim for constructive discharge, (2) the claim for punitive damages, (3) the claim for acts of retaliation, and (4) the claim for emotional distress damages. The motion, initially taken under advisement, was renewed at the close of all the evidence and then was continued under advisement. The matter was submitted to the jury, which returned a special verdict in the form of answers to interrogatories. Specifically, the jury found that defendant retaliated against plaintiff by constructively discharging her and through other adverse employment actions, in violation of Title

Appendix C

VII of the Civil Rights Act of 1964, all occurring after September 30, 1996.[1] The jury awarded plaintiff both compensatory and punitive damages. For the following reasons, the Court ruled from the bench that defendant's motion for judgment as a matter of law must be granted on the issues of constructive discharge and punitive damages.[2]

I.

"Judgment as a matter of law is proper 'when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment.' " *Singer v. Dungan*, 45 F.3d 823, 826 (4th Cir. 1995) (quoting 5A James W. Moore, *Moore's Federal Practice* ¶ 50.07[2] (2d ed. 1994)). This determination is solely a question of law to be determined by the trial court. *Miller v. Premier Corp.*, 608 F.2d 973, 981 n.8 (4th Cir. 1979). In the instant matter, defendant is entitled to judgment as a matter of law if plaintiff fails to make a showing on an essential element of her claims with respect to which she has the burden of proof. *Singer*, 45 F.3d at 827. Where, as here, defendant's motion for judgment as a matter of law is considered after a verdict favorable to plaintiff, plaintiff is entitled to a review of the evidence which gives her "the benefit of all reasonable inferences and all conflicts in the evidence must be

---

1. The jury specifically found that no adverse employment actions were taken prior to September 30, 1996 against plaintiff in retaliation for her complaints of discrimination on behalf of herself and another.

2. Following the trial, defendant renewed its Rule 50 motion for judgment as a matter of law with respect to the remaining liability issues, namely, the claim of retaliation after September 29, 1994 and the claim of emotional distress damages. In the alternative, defendant moved for a new trial on these issues, pursuant to Rule 59, Fed. R. Civ. P. These motions are addressed at the conclusion of this Order.

resolved in [her] favor." *Cox v. Collins*, 7 F.3d 394, 396 (4th Cir. 1993). Yet, the Court must also "take into account the 'uncontradicted and unimpeached' evidence in support of [defendant]." *St. Paul Fire & Marine Ins. Co. v. Vaughn*, 779 F.2d 1003, 1008 (4th Cir. 1985) (citing 9 C. Wright and A. Miller, Federal Practice & Procedure § 2529 (1971)).

II.

To recover for constructive discharge, plaintiff must prove that defendant employer deliberately made her working environment intolerable in an effort to force her resignation. *See, e.g., Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1354 (4th Cir. 1995); *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986). Thus, plaintiff must prove two elements: (1) that her working environment was so intolerable that a reasonable person would feel there was no choice but to resign, *see, e.g., Blistein v. St. John's College*, 74 F.3d 1459, 1468 (4th Cir. 1996); and (2) that defendant employer deliberately created these intolerable working conditions in order to induce plaintiff to quit, *Cavalier Hotel*, 48 F.3d at 1354. In assessing whether defendant employer's conduct is deliberate, the employer is held to intend the reasonably foreseeable consequences of its actions. *Id.* at 1355.

This standard, applied here, compels the conclusion that plaintiff cannot recover for constructive discharge. While the record may be adequate for a reasonable trier of fact to find that defendant deliberately intended to force plaintiff to resign, it does not allow a reasonable trier of fact to conclude that plaintiff's work environment was objectively intolerable. Objective intolerability requires more than a showing that a reasonable person would have viewed resignation as the best

option, and more than a showing that the employee felt subjectively compelled to resign. *Blistein*, 74 F.3d at 1468. The Fourth Circuit has held that objective intolerability is shown where the plaintiff proves that a reasonable person would have had "*no choice* but to resign." *Id.*

Plaintiff's evidence does not demonstrate a work environment so intolerable that a reasonable person would have had no choice but to resign. Plaintiff's testimony and other evidence alleges numerous incidents and actions which she contends created objective intolerability. In essence, the retaliatory acts plaintiff contends created objective intolerability include that:

(1) she was removed from all work after the end of September,[3]

(2) she was essentially demoted through the denial of responsibilities commensurate with her position and experience,[4]

---

3. Plaintiff's testimony and time sheets demonstrate that, in fact, she billed full time until her departure from defendant in early November of 1994. This full time work was evidently not billed to a project, but to an administrative number supplied her by defendant so that plaintiff could account for time spent assisting defendant in the investigation of her claims of discrimination. Plaintiff contends, and for the purposes of this motion it is accepted, that she requested and was denied work on client projects, especially the AF-CIMS project, during this period, essentially the month of October.

4. Plaintiff's contention with respect to her demotion is based chiefly on the tasks assigned to her on the AF-CIMS project in September. Plaintiff billed full-time to client projects in September, and most of that time was billed to AF-CIMS. Yet plaintiff contends that the tasks to which she was assigned were insubstantial and represent a functional demotion,

(Cont'd)

(3) she was denied bonus compensation commensurate with her position and to which she was entitled,

(4) she was excluded from meetings concerning a project with which she was involved,

(5) she was denied a computer necessary to produce work on a particular project,

(6) she was snubbed by subordinates,

(7) colleagues dismissed her suggestions,

(8) she was verbally berated by a project supervisor who criticized her unfairly, and

(9) her complaints of retaliatory treatment and gender discrimination were not addressed by supervisors with the authority to correct the situation.

Plaintiff admits that she was never asked to leave defendant's employ and, indeed, further admits that defendant's president sought to induce her to stay by offering her a position working directly for him. Nonetheless, plaintiff left defendant, accepting a job offer she had received from another corporation prior to her resignation.

(Cont'd)

i.e., an adverse employment action. Even accepting for the purposes of this motion that the tasks were insubstantial, the jury, by finding that defendant committed no adverse employment actions prior to September 30, 1996, expressly rejected the conclusion that the nature of the AF-CIMS tasks assigned to plaintiff in September amounted to a demotion.

Appendix C

The jury specifically found that defendant took no retaliatory adverse employment actions against plaintiff before September 30, 1996. Many of the acts complained of in plaintiff's constructive discharge claim took place before this date. While a constructive discharge claim might be based on acts which do not individually constitute adverse employment actions, that claim would require acts of considerably more repetition or severity than the acts defendant allegedly performed.

After September 30, 1996, plaintiff essentially contends that she was forced to leave as a result of (i) defendant's refusal to assign plaintiff AF-CIMS work, (ii) defendant's failure to address her claim that defendant discriminated against women, particularly in pay, and (iii) plaintiff's feelings of isolation and the hostility directed at her from co-workers. Plaintiff's contention regarding the denial of work is refuted by her time sheets from this period which demonstrate that she billed full-time on days on which she had not taken personal or medical leave. While this time was billed to an administrative number and not to client projects, and, for the purposes of this motion, it is accepted that plaintiff requested and was denied work on the AF-CIMS project during this period, that denial will not support a finding of objective intolerability. Significantly, the AF-CIMS project was not the only project plaintiff was involved with, nor could this project be expected to be the only work available in the future. The uncontradicted testimony makes clear that numerous projects in various stages of development exist simultaneously at Titan.[5] Thus, while the denial of work on the

5. In fact, the record reflects that Knauf, the president of Titan East, offered plaintiff a role in the initial phase of a project proposal before her resignation. Nevertheless, she chose not to pursue this option and left defendant for other employment. Plaintiff contends that the offer

(Cont'd)

Appendix C

AF-CIMS project might constitute a temporary reduction in duties, the nature of defendant's business is that other project opportunities would become available in the future.

Moreover, any reduction in duties for the month of October is mitigated by plaintiff's absence for thirteen of the twenty-one working days in that month for personal and medical reasons. From September 30, 1994, the day after plaintiff's conference call with defendant regarding her complaints of discrimination, until plaintiff's resignation on November 4, 1994, there were twenty five working days.[6] In this time period, plaintiff's testimony establishes that she spent two days on personal leave, eleven days on temporary disability leave, and twelve days billing to the administrative number provided by defendant. Thus, any reduction in plaintiff's duties was not only prospectively temporary, but also quite brief. Plaintiff need not tolerate any reduction in duties or position related to sex discrimination or retaliation. Yet, the law prohibits plaintiff from

---

(Cont'd)
was illusory, and that Knauf admitted as much subsequent to her separation from defendant. Regardless of the feasibility of Knauf's proposition, it is clear that project opportunities came available periodically and would continue to become available in the future. Thus, the denial of work on one project in these circumstances does not create a work environment so intolerable that a reasonable person would have no choice but to leave.

6. This calculation does not include November 4, 1996. Although plaintiff's time-sheets reflect that eight hours were billed that day by plaintiff, plaintiff's testimony establishes (1) that her decision to leave was made on November 3, and (2) that defendant left after her exit interview and out-processing. Thus, plaintiff's duties for this day were not a factor in her decision to leave defendant and are irrelevant to a consideration of constructive discharge.

recovering damages for her discharge unless such reductions make her work environment so intolerable that a reasonable person would have no choice but to quit. The facts of this case, namely, the denial of work on the AF-CIMS project for just over two working weeks, do not create this objectively intolerable work environment.

Fairly read, the record makes clear that plaintiff's chief reason for leaving was defendant's failure to address plaintiff's work environment to her satisfaction. This plainly cannot create objective intolerability. Were this otherwise, a plaintiff could bootstrap tolerable conditions into an intolerable working environment by claiming that an employer responded inadequately to complaints concerning the tolerable workplace. For example, plaintiff here complained to officers of defendant concerning defendant's discriminatory treatment toward women, principally in the form of unequal pay. Yet the unequal pay contention was explicitly rejected by the jury in the first trial of this matter. Thus, if the failure to address plaintiff's complaints of discrimination can create objective intolerability, then the absurd result would follow that defendant's failure to address aspects of the working environment which are non-discriminatory, not to mention tolerable, could render that environment intolerable. This result is illogical and clearly inconsistent with the extraordinary remedy of recovering damages for constructive discharge.[7]

---

7. Plaintiff argued at trial that there is an analytical distinction between the failure of defendant to address her complaints of discrimination and the failure of defendant to address her complaints of retaliation. This argument is unpersuasive because it also leads to an illogical result, namely, that complaints of retaliatory acts, which do not by themselves create an objectively intolerable working place, somehow operate to convert the working conditions from objectively tolerable to

(Cont'd)

Appendix C

An employee is not guaranteed freedom from the stresses and frustrations of the modern workplace. "Dissatisfaction with work assignments, a feeling of being unfairly criticized, or difficult or unpleasant working conditions are not so intolerable as to compel a reasonable person to resign." *Carter v. Ball*, 33 F.3d 450, 459 (4th Cir. 1994). This result is necessary to avoid transforming constructive discharge from a protective doctrine for plaintiffs facing extraordinary and unreasonably harsh conditions, into an authorization for any plaintiff facing discriminatory treatment to choose to leave employment, and then recover damages for that choice.

Plaintiff's evidence demonstrates that her working conditions may have been unpleasant and even subjectively intolerable. But the acts of defendant reasonably attributable to retaliation for plaintiff's complaints of discrimination did not create an environment in which a reasonable person would have

---

(Cont'd)

objectively intolerable merely because the employer does not agree that the acts either occurred or are retaliatory. Thus, for the purposes of assessing whether workplace conditions are objectively intolerable, it does not matter whether or not the discriminatory acts and conditions complained of constitute retaliation. In other words, the constructive discharge analysis does not turn on whether the discriminatory acts complained of are retaliatory. In any event, plaintiff's contention regarding defendant's failure to address complaints of retaliation primarily involves discussions between plaintiff and officers of defendant up to and including the conference call of September 29, 1994. Plaintiff argues that during the course of these conversations she complained of retaliation in the assignment of AF-CIMS work and in her treatment by AF-CIMS project supervisors, but that defendant did not respond. The jury found no retaliation before September 30, 1994 and, thus, defendant cannot have created an objectively intolerable work place by failing to address retaliation before that date.

had no choice but to leave.[8] Plaintiff does not demonstrate objective intolerability and, thus, an element of constructive discharge is not satisfied. Accordingly, judgment as a matter of law for defendant is appropriate on the constructive discharge claim.

---

8. This conclusion is supported by a reading of Fourth Circuit opinions addressing objective intolerability. *See, e.g., Amimokri v. Baltimore Gas and Elec. Co.*, 60 F.3d 1126, 1128-32 (4th Cir. 1995) (daily public epithets regarding employee's national origin by supervisor who encouraged others to do the same constitutes objective intolerability sufficient to raise jury issue on constructive discharge); *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1349 (4th Cir. 1995) (harassment and assault by supervisor including rape of plaintiff constitutes objective intolerability sufficient to raise jury issue on constructive discharge); *Paroline v. Unisys Corp.*, 879 F.2d 100, 108 (4th Cir. 1989) (sexual overtures and attack on plaintiff by supervisor with history of sexual harassment constitutes objective intolerability sufficient to raise jury issue on constructive discharge). Plaintiff attempts to draw support for her position on objective intolerability from *Beardsley v. Webb*, 30 F.3d 524, 531 (4th Cir. 1994). *Webb* provides no guidance on constructive discharge because the plaintiff's constructive discharge claims in that case were expressly rejected by the district court and this rejection was affirmed by the Fourth Circuit panel. *Id.* at 531 (district court allowed proof that resignation was caused by supervisor as part of damages in claim against supervisor). Moreover, the work environment in *Webb* was objectively far more offensive than plaintiff's work environment. In particular, the environment in *Webb* included sexual advances and unwanted touching in front of other employees including the plaintiff's husband, harassing questions concerning the plaintiff's underwear and birth control, and retaliatory conduct when defendant's advances were rebuked. *Id.* at 528-30. Thus, in no way does *Webb* support the conclusion that, in the instant matter, plaintiff's work environment was objectively intolerable.

Appendix C

III.

Punitive damages are authorized for violations of Title VII by 42 U.S.C. § 1981a. To recover punitive damages, plaintiff must first demonstrate that defendant engaged in unlawful intentional discrimination. 42 U.S.C. § 1981a(a)(1). If defendant engaged in intentional discrimination, then punitive damages may be recovered if plaintiff demonstrates that defendant "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1).

Considering all the evidence favorable to plaintiff and all favorable reasonable inferences from that evidence, a rational trier of fact could not conclude that plaintiff was entitled to punitive damages. There is no evidence in the record that any retaliatory acts by defendant were conducted with malice, ill-will, spite or hatred. But this does not end the analysis. Punitive damages are also awarded where defendant's discrimination was with "reckless indifference" to plaintiff's federally protected rights. To demonstrate "reckless indifference", plaintiff relies on testimony that defendant had a plan to get rid of her[9] and defendant's failure to address her claims of retaliation, in addition to defendant's intentional retaliatory acts. This evidence

---

9. This testimony refers to a comment made to Greg Monsma, a former employee of defendant, by Cheryl Sundin, defendant's human resources manager. Sundin admitted making a statement to that effect, but testified that the statement referred to the severance package being prepared for plaintiff by defendant. This account of the comments context is not contradicted by Monsma's testimony. Even accepting the evidence in the light most favorable to plaintiff, this statement is too weak a reed to support an award of punitive damages.

demonstrates little more than defendant's intent. But the "reckless indifference" standard for awarding punitive damages must require more than a showing of intentional retaliation. Otherwise, punitive damages would be awarded in all retaliation cases, because a victorious plaintiff will necessarily have demonstrated that defendant knew plaintiff was engaged in federally protected activity and that defendant, as a result of this, intentionally retaliated against plaintiff. Where a tort involved is an intentional tort, the line between conduct warranting punitive damages and conduct not warranting such damages may be indistinct and difficult to draw. But it cannot be the case that all intentional torts warrant punitive damages. *See, e.g., Hogue v. MOS Inspection, Inc.*, 875 F. Supp. 714, 725 (D. Colo. 1995) ("Not every intentional violation of a plaintiff's constitutional rights subjects a defendant to punitive damages."). Wherever the line of conduct warranting punitive damages is, it is clear that plaintiff's claims falls far short of that line. Were the law otherwise, every Title VII claim would warrant submission of punitive damages to the jury. Neither the law nor sensible policy require such a result.

Because plaintiff presents insufficient evidence from which a reasonable trier of fact could find that defendant acted with malice or with reckless indifference to plaintiff's federally protected rights, defendant is entitled to judgment as a matter of law on the issue of punitive damages.

In sum, defendant's motion for judgment as a matter of law, pursuant to Rule 50, Fed. R. Civ. P., is **GRANTED** with respect to constructive discharge and punitive damages. Defendant, at trial and in a motion filed following the trial, further moves for judgment as a matter of law with respect to the claim of retaliation after September 29, 1994 and the claim of emotional

distress damages. In the alternative, defendant moves for a new trial on these claims, pursuant to Rule 59, Fed. R. Civ. P. The Rule 50 motion with respect to retaliation and emotional distress damages is **DENIED.** Defendant's motion for a new trial on these claims is **TAKEN UNDER ADVISEMENT,** and will be decided on the briefs without further oral argument.

The Clerk is directed to send copies of this Order to all counsel of record.

s/ T. S. Ellis, III
United States District Judge
T. S. Ellis, III

Alexandria, Virginia
December 24, 1996

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION DATED JULY 22, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 95-900-A

CELINDAH J. GRIER,

Plaintiff,

v.

TITAN CORP.,

Defendant.

ORDER

This matter is before the Court on (i) defendant's motion for a new trial pursuant to Rule 59, Fed. R. Civ. P., (ii) plaintiff's motion for an award of back pay and front pay, and (iii) plaintiff's motion for an award of attorney's fees.

For the reasons stated from the bench:

1. Defendant's motion for a new trial is **GRANTED.**

2. Plaintiff's motion for an award of back pay and front pay is **DENIED AS MOOT.**

Appendix D

3. Plaintiff's motion for an award of attorney's fees is **DENIED AS MOOT.**

The Clerk is directed to send copies of this Order to all counsel of record.

s/ T. S. Ellis, III
T. S. Ellis, III
United States District Judge

Alexandria, Virginia
July 22, 1996

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING FILED SEPTEMBER 9, 1997

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-1167
CA-95-900-A

CELINDAH J. GRIER

Plaintiff - Appellant

v.

THE TITAN CORPORATION

Defendant - Appellee

No. 97-1168
CA-95-900-A

CELINDAH J. GRIER

Plaintiff - Appellee

v.

TITAN CORPORATION

Defendant - Appellant

On Petition for Rehearing with Suggestion
for Rehearing In Banc

Appendix E

The appellant's/cross-appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,
/s/ Patricia S. Connor
CLERK

APPENDIX F — STATUTORY PROVISIONS INVOLVED

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

§ 704 [§ 2000e-3]. Other unlawful employment practices

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Appendix F

Section 1981a of the Civil Rights Act

42 U.S.C. § 1981a

§ 1981a. Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 2000e-5 or 2000e-16 of this title against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 2000e-2, 2000e-3, or 2000e-16 of this title, and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 2000e-5(g) of this title, from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 2000e-5 or 2000e-16 of this title (as provided in section 12117(a) of this title, and section 794a(a)(1) of title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of title 29 and the regulations implementing section 791 of title 29, or who violated the requirements of section 791 of title 29 or the regulations

implementing section 791 of title 29 concerning the provision of a reasonable accommodation, or section 12112 of this title, or committed a violation of section 12112(b)(5) of this title, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 2000e-5(g) of this title, from the respondent.

(3) Reasonable accommodation and good faith effort

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 12112(b)(5) of this title or regulations implementing section 791 of title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

Appendix F

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 2000e-5(g) of this title.

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party —

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

Appendix F

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section —

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

(d) Definitions

As used in this section:

(1) Complaining party

The term "complaining party" means —

(A) in the case of a person seeking to bring an action under subsection (a)(1) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under subchapter VI of this chapter, or

(B) in the case of a person seeking to bring an action under subsection (a)(2) of this section, the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or

proceeding under section 794a(a)(1) of title 29, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.).

(2) Discriminatory practice

The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a) of this section.

Supreme Court, U.S.
FILED
JAN 8 1998
CLERK

No. 97-950

In The

Supreme Court of the United States

October Term, 1997

CELINDAH J. GRIER,

Petitioner,

vs.

TITAN CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT, TITAN CORPORATION'S, OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

K. Stewart Evans, Jr.
Counsel of Record
PEPPER HAMILTON LLP
Attorneys for Respondent
1300 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 828-1200

10 pp

QUESTIONS PRESENTED FOR REVIEW

1. **Punitive Damages:** Did Judge Ellis, the trial judge, correctly conclude that Ms. Grier failed to produce legally sufficient evidence from which the jury could find that Titan acted with reckless disregard of Ms. Grier's federally protected rights?

2. **Constructive Discharge**: Did Judge Ellis, the trial judge, correctly apply the legal standard of objective intolerability in concluding that Ms. Grier failed to prove an essential element of her claim for constructive discharge?

DISCLOSURE STATEMENT
REQUIRED BY RULE 29.6

Titan Corporation identifies the following subsidiaries:

1. Diversified Control Systems, Inc.
2. Eldyne, Inc.
3. Federal Services, Inc.
4. Pulse Sciences, Inc.
5. Titan Environmental Corporation
6. Linkabit Wireless, Inc.
7. Tomotherapeutics, Inc.
8. Unidyne Corporation
9. ServNow NetTechnologies, Inc.
10. Titan Broadband Communications Corporation
11. Titan Software Systems Corporation
12. Linkabit Wireless Limited
13. Titan Information Technologies Corporation

TABLE OF CONTENTS

Page

Questions Presented for Review i

Disclosure Statement Required by Rule 29.6 ii

Table of Contents iii

Table of Cited Authorities v

Table of Appendix vi

Statement of the Case 1

1. Ms. Grier Improperly Relies Upon Facts Which Occurred Before September 29, 1994. .. 1

2. Ms. Grier Continues to Claim That Titan Did Not Address "Her Issues" the Way She Desired. 2

3. Ms. Grier Misstates the Record Facts. 4

4. Titan's Statement of Facts Relevant to This Court's Consideration. 4

5. Judge Ellis Submitted the Issue of Constructive Discharge and Punitive Damages to the Jury Despite His Conviction That No Evidence Supported Either. 5

Reasons for Denying the Writ 6

1. The Court is Ask to Resolve Factual Disputes Already Resolved by Judge Ellis Whose Factual Findings the Fourth Circuit Affirmed. 6

2. There Is No Real Conflict Between the Circuit Courts of Appeal Regarding the Requirement of Proof of Malice or Reckless Indifference to Support Punitive Damages. 6

3. Both Judge Ellis and the Fourth Circuit Court of Appeals Correctly Applied the Objective Intolerability Standard to the Evidence of the Treatment of Ms. Grier Between September 29, 1994, and November 4, 1994, When She Resigned. 6

Argument in Support of Denying the Writ 7

1. The Court is Ask to Resolve Factual Disputes Already Resolved by Judge Ellis Whose Factual Findings the Fourth Circuit Affirmed. . . 7

2. There Is No Real Conflict Between the Circuit Courts of Appeal Regarding the Requirement of Proof of Malice or Reckless Indifference to Support Punitive Damages. 7

3. Both Judge Ellis and the Fourth Circuit Correctly Applied the Objective Intolerability Standard to the Evidence of the Treatment of Ms. Grier Between September 29, 1994, and November 4, 1994, When She Resigned. 11

Conclusion 12

TABLE OF CITED AUTHORITIES

CASES

Barbour v. Merrill, 48 F.3d 1270 (D.C. Cir. 1995), cert. granted, ___ U.S. ___, 116 S. Ct. 805, 133 L. Ed. 2d 752 cert. dismissed, ___ U.S. ___, 116 S. Ct. 1037, 134 L. Ed. 2d 113 (1996) 8

Blistein v. St. John's College, 74 F.3d 1459 (4th Cir. 1996) 12

Harris v. L & L Wings, Incorporated, ____ F.3d ____, 1997 WL 786926 (4th Cir. December 24, 1997) 10

Kolstad v. American Dental Association, 108 F.3d 1431 (D.C. Cir. 1997), reh'g in banc granted 108 F.3d 1446 (D.C. Cir. 1997) 9, 10

Merriweather v. Family Dollar Store of Indiana, Inc., 103 F.3d 576 (7th Cir. 1996) 9

Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194 (1st Cir. 1987) .. 9

Smith v. Wade, 461 U.S. 30, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983) 8, 9, 10

Vasbinder v. Ambach, 926 F.2d 1333 (2nd Cir. 1991) 9

Williamson v. Handy Button Machine Co., 817 F.2d 1290 (7th Cir. 1987) 8, 9

STATUTE

42 U.S.C. § 1983 8

RULE

Fed. R. Civ. P. 50 8,9

TABLE OF APPENDIX

Appendix A - Excerpt from the Opening Brief of Celindah Grier, U.S. Court of Appeals for the Fourth Circuit, Filed March 19, 1997. . . . . 1a

Statement of Issues 1a

Appendix B - Excerpts from the Transcripts of the Trial: November 25, 1996 - December 4, 1996. . . . . 2a

Appendix C - Order of the United States District Court for the Eastern District of Virginia, Alexandria Division filed November 20, 1996 . . . . . 44a

STATEMENT OF THE CASE

Ms. Grier Improperly Relies Upon Facts Which Occurred Before September 29, 1994, Continues to Claim That Titan Did Not Address "Her Issues" the Way She Desired, And Misstates the Record Facts.

1. Ms. Grier Improperly Relies Upon Facts Which Occurred Before September 29, 1994.

Because the jury found no adverse employment actions against Ms. Grier prior to September 29, 1994,[1] the facts pertinent to this Petition occurred between September 29, 1994, and November 4, 1994. Ms. Grier did not appeal the jury's finding of no adverse employment actions prior to September 29, 1994.[2] Despite the juries' finding of no adverse employment actions against Ms. Grier prior to September 29, 1994, Ms. Grier relies upon facts that occurred before September 29, 1994, to support her argument that Titan acted with "reckless indifference" to her federally protected rights, Petition For A Writ of Certiorari, ("Petition") at 7, and that Ms. Grier was given "no choice" but to resign, Petition at 12-13.

The "bullshit" comment, upon which Ms. Grier chiefly relies to support her contention that the evidence supports reckless indifference, Petition at 3 and 7, actually occurred in May or June

---

[1] The jury answered "No" to the question, "Do you find, by a preponderance of the evidence, that defendant took adverse employment actions against plaintiff between August 4, 1994, and September 28, 1994, and that plaintiff's protected activity was the determinative factor in defendant's decision to take any retaliatory adverse employment actions against plaintiff during this period? (J.A. 6611) References to the record are to the Joint Appendix Filed with the Fourth Circuit Court of Appeals.

[2] Statement of Issues from Opening Brief of Celindah Grier, United States Court of Appeals for the Fourth Circuit, Record No. 97-1167 and Record No. 97-1168, a copy of which is attached as Appendix A.

1994, (J.A. 04855-04356), Titan's Opposition to Petition For A Writ of Certiorari ("Titan's Opposition"), Appendix B at 9a - 10a. May or June 1994 is not only prior to September 29, 1994, but is prior to August 4, 1994, the date before which Judge Eillis ruled Ms. Grier could not attempt to show any acts of retaliation. November 20, 1996, Order, ¶¶ e.1. and 2.. (J.A. 04711- 04715), Titan's Opposition, Appendix C at 46a - 47a. And, to add insult to injury, Ms. Grier's counsel, herself, argued in closing that the "bullshit" remark was made in May or June 1994. (J.A. 06484-06485), Titan's Opposition, Appendix B at 40a - 42a.

The entire fourth paragraph of Ms. Grier's "Factual Predicates" refers to facts that occurred prior to September 29, 1994. The assertion that Ms. Grier "... was relieved of her management responsibilities," Petition at 2, is based upon testimony about an organizational chart first seen by Ms. Grier when she returned to work at Titan after medical leave. (J.A. 04880-04882), Titan's Opposition, Appendix B at 17a - 19a. Grier left Titan on disability in the month of June 1994 (J.A. 01357) and returned on August 8, 1994 (J.A. 01164).

Ms. Grier's testimony at J.A. 04890, J.A. 04896, and J.A. 04993, Titan's Opposition, Appendix B at 19a - 20a, 20a - 21a and 26a, (*See* J.A. 04987 - J.A. 04993, Titan's opposition, Appendix B at 22a - 26a for the context of Ms. Grier's testimony at J.A. 04993), which are referred to in paragraph 4 of Ms. Grier's "Factual Predicates", all relate to discussions Ms. Grier had with Walker in August, 1994.

2. **Ms. Grier Continues to Claim That Titan Did Not Address "Her Issues" the Way She Desired.**

Judge Ellis first rejected Ms. Grier's failure to address theory on November 20, 1996, in his ruling granting Titan's Motion in Limine to prevent Ms. Grier from arguing the validity of her underlying discrimination claims. (J.A. 04713 at ¶ e.3.), Titan's Opposition, Appendix C at 47a.

Judge Ellis sustained objections to Ms. Grier's reference to Titan's failure to address "her issues" and the validity of complaints of discrimination during Ms. Grier's opening statement. (J.A. 04729-04730; J.A. 04789-04793; J.A. 04814-04816), Titan's Opposition, Appendix B at 2a - 3a; 3a - 7a; 7a - 9a.

Judge Ellis continued to rule throughout the trial that the validity of Ms. Grier's complaints was irrelevant despite Ms. Grier's concerted effort to make Titan's alleged failure to address Ms. Grier's "issues" the focal point of her case. (J.A. 04870-04878; J.A. 05066-05068; J.A. 05466-05467), Titan's Opposition, Appendix B at 10a - 17a; 31a - 33a; 37a - 38a.

Judge Ellis instructed the jury that the validity or invalidity of Ms. Grier complaints was not relevant , (J.A. 06577-06578), Titan's Opposition, Appendix B at 42a - 43a, and ruled in his December 24, 1996, Order that Titan's failure to address Ms. Grier's complaints of discrimination could not create objective intolerability. Petition, Appendix C at 26a.

By her assertion "After repeated attempts to have Titan address its pervasive discrimination against women, Titan's top managers successfully plotted to force Ms. Grier's resignation,"[3] Ms. Grier continues to raise, improperly, the issue of how women at Titan were treated,[4] at this late date.

Ms. Grier's reference to in her Statement of Facts, Petition at 3, to her attempt to discuss one of her charts and Mr. Nelson's response during the September 29, 1994, telephone conference call, is to testimony to which Judge Ellis sustained Titan's counsel objection by ruling that the refusal to address issues could not be the

---

[3] Petition at 2. Grier presented no evidence of a plot or conspiracy against her and did not argue a plot or conspiracy; therefore, this statement is pure hyperbole and unsupported by the record.

[4] "THE COURT: Let me say further at this point, Ms. Grier's claim of unequal treatment of women is not at issue in this case." (J.A. 04791-04792), Titan's Opposition, Appendix B at 5a - 6a.

basis for constructive discharge. (J.A. 05052-05057), Titan's Opposition, Appendix B at 26a - 31a.

Likewise Judge Ellis sustained Titan's objection, (J.A. 05067-05068) Titan's Opposition, Appendix B at 32a - 33a, to Ms. Grier's testimony that she responded to "this indifference" by asserting that "... her situation 'had been intolerable'...", Petition at 3.

3. **Ms. Grier Misstates the Record Facts.**

In the third paragraph of her "Factual Predicates", Ms. Grier misrepresents Mr. Monsma's testimony of what he heard Ms. Sundin say as Ms. Sundin's testimony and misrepresents Ms. Sundin's testimony that Ms. Grier was trying to make issues where none existed. (J.A. 05451), Titan's Opposition, Appendix B at 36a, (J.A. 05480-05481), Titan's Opposition, Appendix B at 38a - 40a.

Ms. Grier's assertion, Petition at 3-4, that her return as Deputy General Manager would be a hollow position misrepresents a quote from the record which does not relate to any duties she might have as Deputy General Manager, but to the AFCIMS project and what her role would not be on the project. (J.A. 05099-05100), Titan's Opposition, Appendix B at 33a - 35a.

The "I have no idea what Ms. Grier would be doing as Deputy General Manger" statement Ms. Grier attributes to Mr. Knauf, Petition at 4, misrepresents Mr. Knauf's answer to the question "What would Celindah Grier **have been doing for the UEP** if she returned -- or continued as deputy general manager?" (J.A. 05860) Titan's Opposition, Appendix B at 40a.

4. **Titan's Statement of Facts Relevant to This Court's Consideration.**

The record facts between September 29, 1994, and November 4, 1994, show that Ms. Grier knew she could continue to work at Titan, (J.A. 05127); that Ms. Grier chose to terminate her

employment with Titan on November 4, 1994, after applying for a job with the James Martin Company on October 20, 1994, (J.A. 04668), after receiving a job offer from the James Martin Company dated October 28, 1994, (J.A. 04671, J.A. 05445), and after accepting the job at the end of October 1994 (J.A. 04671).[5]

The record facts also show that Ms. Grier worked full time after September 29, 1994, until she left Titan on November 4, 1994. Between September 26 and 30, 1994, Ms. Grier billed 29 hours to AFCIMS and 14 hours to discretionary overhead. (Titan Exhibit 9, J.A. 04697-04705; Grier Testimony, J.A. 05152, 05172-05176).[6] Grier was out on disability between October 3 and 7. (*Id.*) After the first week in October, Ms. Grier worked at home and at the office, so she could concentrate on the investigation being performed by Titan into her complaints. (J.A. 05202, J.A. 05205-05206). Mr. Knauf, CEO of Titan East, gave Ms. Grier a billing number designated "special project" which she billed to until she resigned. (J.A. 05078, J.A. 05784-05785).

5. **Judge Ellis Submitted the Issue of Constructive Discharge and Punitive Damages to the Jury Despite His Conviction That No Evidence Supported Either.**

Judge Ellis submitted constructive discharge and punitive damages to the jury, even though Judge Ellis believed Ms. Grier's evidence was legally insufficient, in order to avoid a retrial if the Fourth Circuit disagreed with Judge Ellis as to the proper standards.

---

[5] Judge Ellis found "Plaintiff admits that she was never asked to leave defendant's employ and, indeed, further admits that defendant's president sought to induce her to stay by offering her a position working directly for him. Nonetheless, plaintiff left defendant, accepting a job offer she had received from another corporation prior to her resignation. December 24, 1994, Order of the United States District Court for the Eastern District of Virginia, Petition, Appendix C at 23a.

[6] *See* also Grier's Exhibit 85, which was not made part of the Appendix, but which was admitted as a joint exhibit. (J.A. 03074).

(J.A. 06470-06473, 06605, 06637)(Opinion of the United States Court of Appeals for the Fourth Circuit, Petition, Appendix A at 5a-6a)(December 24, 1994, Order of the United States District Court for the Eastern District of Virginia, Petition, Appendix C.)

REASONS FOR DENYING THE WRIT

1. **The Court is Ask to Resolve Factual Disputes Already Resolved by Judge Ellis Whose Factual Findings the Fourth Circuit Affirmed.**

a. Ms. Grier asks this Court to reconsider and resolve facts in her favor which Judge Ellis, the trial judge, found were not legally sufficient to support Ms. Grier's claim of constructive discharge and punitive damages; and

b. Ms. Grier's argument is dependent upon facts which she misstates and which are irrelevant based upon the jury's finding of no adverse employment actions against her prior to September 29, 1994.

2. **There Is No Real Conflict Between the Circuit Courts of Appeal Regarding the Requirement of Proof of Malice or Reckless Indifference to Support Punitive Damages.**

3. **Both Judge Ellis and the Fourth Circuit Court of Appeals Correctly Applied the Objective Intolerability Standard to the Evidence of the Treatment of Ms. Grier Between September 29, 1994, and November 4, 1994, When She Resigned.**

ARGUMENT IN SUPPORT OF DENYING THE WRIT

1. The Court is Ask to Resolve Factual Disputes Already Resolved by Judge Ellis Whose Factual Findings the Fourth Circuit Affirmed.

When examined, Ms. Grier's arguments on punitive damages and constructive discharge are based upon facts resolved against her by both Judge Ellis and the United States Court of Appeals for the Fourth Circuit. Ms. Grier admits that there must be proof of reckless indifference to support punitive damages and proof of objective intolerability. Ms. Grier simply disagrees with Judge Ellis' thorough analysis of the evidence in his December 24, 1994, Opinion, Petition, Appendix C. Ms. Grier relies upon irrelevant facts and misstated facts in an effort to convince this Court to re-examine the facts and come to a conclusion opposite from the conclusion reached by Judge Ellis and Judges Luttig, Williams, and Anderson, who constituted the Fourth Circuit panel.

For example, the facts stated by Ms. Grier in her Petition at 12-13 in support of her argument that she was given no choice but to resign were closely examined by Judge Ellis and rejected because they occurred before September 29, 1994, or they were contradicted by credible evidence, or they were contrary to admissions made by Ms. Grier. December 24, 1994, Order, Petition, Appendix C at 22a-28a.

2. There Is No Real Conflict Between the Circuit Courts of Appeal Regarding the Requirement of Proof of Malice or Reckless Indifference to Support Punitive Damages.

No court has held that whenever a plaintiff proves intentional discrimination, the plaintiff is entitled to have the jury consider punitive damages because proof of intentional discrimination **always** equals proof of reckless disregard for the

plaintiff's federally protected rights. Yet, this is the standard that Ms. Grier urges.

This Court has held in an action under 42 U.S.C. § 1983 that where the underlying standard of liability for compensatory damages is recklessness, it is appropriate for the jury to consider punitive damages based upon the same standard. *Smith v. Wade*, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983). But, this Court's holding in *Smith v. Wade* does not establish the new formula for punitive damages urged by Ms. Grier that in **every** case where there is prima facie proof of intentional discrimination, the trial court no longer has the duty to weigh the evidence under FED. R. CIV. P. 50.

Courts interpreting *Smith v. Wade* have held that proof of intentional discrimination **may** support an award of punitive damages. *See Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995), *cert. granted*, __ U.S. __ , 116 S.Ct. 805, 133 L.Ed.2d 752, *cert. dismissed*, __ U.S. __ , 116 S.Ct. 1037, 134 L.Ed.2d 113 (1996) (voluntary settlement by parties)(In a section 1991 racial discrimination case proof of the discrimination **may** also serve to satisfy the requirement to prove callous of reckless disregard of the plaintiff's federally protected rights). However, none of the cases cited by Ms. Grier support the new formula which she advocates. In each of them, the appellate court found the evidence legally sufficient to support a finding of punitive damages.

In *Williamson v. Handy Button Machine Co.*, 817 F.2d 1290 (7th Cir. 1987), the unobjected to jury instruction on punitive damages did not mention malice or reckless indifference.[7] The Seventh Circuit described the jury instruction as "... the equivalent of telling them to award punitive damages 'if you want.'" and found

---

[7] *Williamson v. Handy Button Machine Co.*, 817 F.2d 1290, 1296 (7th Cir. 1987).

that evidence of ten years of racial discrimination supported punitive damages under the instruction.[8]

In *Vasbinder v. Ambach*, 926 F.2d 1333 (2nd Cir. 1991), the Court found the instructions regarding compensatory and punitive damages "... did not purport to advise the jury that the threshold for an award of compensatory damages was the same as that for an award of punitive damages."[9] The Second Circuit also found record evidence well in excess of that necessary to support a finding of liability.[10]

In *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, n.5 204-205 (1st Cir. 1987), the trial court instructed the jury: "Where a plaintiff in a racial discrimination case establishes the elements of malice, or callous and reckless indifference by a preponderance of the evidence, then a jury is allowed in its discretion to assess punitive damages ..." This instruction follows *Smith v. Wade* and like *Smith v. Wade* did not eliminate a trial judge's duty to determine on a FED. R. CIV. P. 50 motion whether there was a " ... legally sufficient evidentiary basis for a reasonable jury ... to find a reckless disregard of federally protected rights."

In *Merriweather v. Family Dollar Store of Indiana, Inc.*, 103 F.3d 576, 581 (7th Cir. 1996), the trial court specifically found that Family Dollar Store acted with reckless indifference to Merriweather's federally protected rights because "... Family Dollar deliberately gave false reasons for firing Merriweather."

The March 21, 1997, ruling on punitive damages in *Kolstad v. American Dental Association*, 108 F.3d 1431 (D.C. Cir. 1997), *reh'g in banc granted*, 108 F.3d. 1446 (D.C. Cir. 1997), upon

---

[8] *Id.*

[9] *Vasbinder v. Ambach*, 926 F.2d 1333, 1343 (2nd Cir. 1991)

[10] *Id.*

which Ms. Grier relies on heavily, was vacated May 28, 1997, for a in banc rehearing on the issue of punitive damages, for which there has yet to be a published opinion. However, even the March 21, 1997, ruling cautioned that not every case of intentional discrimination would support an award of punitive damages and that "... the district court may need to assess separately whether evidence sufficient to support a finding of intentional discrimination also suffices to instruct the jury on punitive damages."[11]

While in some cases the state of mind necessary for liability may also establish the state of mind necessary to establish reckless indifference to federally protected rights, Grier's case against Titan is not one of them. In his December 24, 1996, Order, Judge Ellis examined Grier's evidence of reckless disregard closely and found it legally insufficient to establish that Titan's intent to retaliate against her amounted to reckless disregard of Ms. Grier's federal protected rights. Petition, Appendix C at 29a-30a.

The cases decided since *Smith v. Wade* consistently hold that evidence of intentional discrimination **may** also be legally sufficient as evidence of the reckless indifference that requires submission of punitive damages to a jury. But, none of cases hold that evidence of intentional discrimination is **always** legally sufficient as evidence of the reckless indifference. Rather, as the Fourth Circuit recently ruled in *Harris v. L & L Wings, Incorporated*, __ F.3d __, 1997 WL 786926 (4th Cir. December 24, 1997):

> In order to reach the jury on the issue of punitive damages, a plaintiff generally must make a "heightened showing" of the culpable state of mind of the employer, not just of the harasser.

---

[11] *Kolstad v. American Dental Association*, 108 F.3d 1431, 1438-1439 (D.C. Cir. 1997).

There is no reason for this Court to review the facts heard and reviewed by Judge Ellis and reviewed by the Fourth Circuit, both of which concluded Ms. Grier's evidence failed to establish the required culpable state of mind for reckless disregard of Ms. Grier's federally protected rights.

3. Both Judge Ellis and the Fourth Circuit Correctly Applied the Objective Intolerability Standard to the Evidence of the Treatment of Ms. Grier Between September 29, 1994, and November 4, 1994, When She Resigned.

Ms. Grier's real complaint is not that the Fourth Circuit has adopted an impossible standard, but that her evidence showed that she had "no choice but to resign." Petition at 12-13. Judge Elllis disagreed. The Fourth Circuit disagreed.

The Fourth Circuit did not find, as Ms. Grier claims, that she "... had a 'choice not to resign' ...",[12] which choice Ms. Grier asserts the evidence shows was meaningless. Rather, the Fourth Circuit affirmed Judge Ellis' findings that Ms. Grier admitted "... that she was never asked to leave defendant's employ, and, indeed, further admits that defendant's president sought to induce her to stay by offering her a position working directly for him. Nonetheless, plaintiff left defendant, accepting a job offer she had received from another corporation prior to her resignation."[13]

Ms. Grier wants this Court to review the record and rule that Judge Ellis, who heard the evidence, erroneously granted Titan's Motion for Judgment as a matter of law. Judge Ellis analyzed Ms. Grier's evidence of constructive discharge in great detail. Judge Ellis quite properly concluded that: (1) Ms. Grier's own time sheets and the availability of other work refuted Ms. Grier's denial of work

---

[12]Petition at 15.

[13]December 24, 1996, Order, Petition, Appendix C at 23a.

contention;[14] (2) Ms. Grier's chief reason for leaving Titan, Titan's failure to address Ms. Grier's issues to her satisfaction, could not create objective intolerability;[15] and Ms. Grier's feelings of isolation, Ms. Grier's feelings of being unfairly criticized and Ms. Grier's dissatisfaction with work assignments did not create objective intolerability.[16] Similarly, the court in *Blistein v. St. John's College*, 74 F.3d 1459, 1468-1469 (4th Cir. 1996), found that Blistein " ... utterly failed to proffer evidence that he was compelled to ..." to resign.

CONCLUSION

Ms. Grier's Petition should be denied. Ms. Grier simply disagrees with the factual findings made by Judge Ellis. Ms. Grier asks this Court to review Judge Ellis' factual findings and to conclude that Judge Ellis wrongly found that Ms. Grier's evidence failed to establish a legally sufficient basis for punitive damages and objective intolerability.

Dated: January 8, 1998

Respectfully submitted,

K. STEWART EVANS, JR.
Counsel of Record
Pepper Hamilton LLP
Attorneys for Titan Corporation
1300 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 828-1230

---

[14]December 24, 1996, Order, Petition, Appendix C, at 24a.

[15]*Id.*

[16]*Id.*

APPENDIX A - EXCERPT FROM THE OPENING BRIEF OF CELINDAH GRIER, U. S. COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED MARCH 19, 1997.

STATEMENT OF ISSUES

Given the procedural posture of this case, this appeal presents an unusually large number of issues:

1. Did the district court err in granting the defendant's motion for a new trial, after the properly-instructed first jury found in favor of Ms. Grier on her retaliation and construction discharge claims, awarding $635,000 in compensatory and punitive damages?

2. Did the district court properly conclude, based on incorrect dictum from an unpublished opinion of this Court, that there is no common law cause of action under Virginia law for constructive discharge?

3. Did the district court properly grant the defendant's motion for judgment as a matter of law on Ms. Grier's constructive discharge claims, after a second jury found in her favor on these claims?

4. Did the district court properly grant the defendant's motion for judgment as a matter of law on Ms. Grier's claim for punitive damages after a properly-instructed second jury found in her favor, awarding $800,000 in punitive damages?

5. Did the district court abuse its discretion in excluding probative evidence from the second trial, and in instructing the jury at the second trial?

6. Did the district court properly grant summary judgment in favor of the defendant on Ms. Grier's hostile environment claim of gender-based discrimination?

APPENDIX B - EXCERPTS FROM THE TRANSCRIPTS OF THE TRIAL: NOVEMBER 25, 1996 - DECEMBER 4, 1996.

November 25, 1996, Page 12, Joint Appendix 04729

THE COURT: "Gender" strictly does not generally refer to male and female. The proper way is sex discrimination.

ATTORNEY EVANS: I have no objection, your Honor.

THE COURT: I will explain as to gender.

ATTORNEY EVANS: Correct, your Honor.

THE COURT: I might.

So, you are saying, Ms. Bredehoft, that in the case of -- she helped others make sex discrimination claims; that wouldn't be gender, that would be sex discrimination.

ATTORNEY BREDEHOFT: No, your Honor. My concern there is to take out the "sex" altogether, because the discrimination was of a broader context than gender discrimination, than the other --

THE COURT: I am going to tell them, also, early in the case that the underlying validity of the claim, her claim or anyone else's claim, is not an issue here.

ATTORNEY BREDEHOFT: Yes, I understand that your Honor is going to do that. I just wanted to be accurate.

THE COURT: So, tell me again now, you would prefer that it say "gender discrimination" rather than

November 25, 1996, Page 13, Joint Appendix 04730

"sex discrimination"?

ATTORNEY BREDEHOFT: For Ms. Grier; and then take out the word "sex" altogether on the second, and just "discrimination."

I just want to be precise.

Appendix B

THE COURT: All right.

ATTORNEY BREDEHOFT: Thank you, your Honor.

ATTORNEY EVANS: Your Honor, I am only aware there was one other, and it shouldn't be "and others." We are only talking about the incident that allegedly occurred on the 24th of September.

And may I also suggest, your Honor, that you consider explaining to the jury prior to opening statements the significance of August 4th?

THE COURT: No, I am not going to do that before opening statements -- well, I will consider that. I will consider that. I didn't do it before, and I ended up having to do it. I will think about that.

What was the second thing, Ms. Bredehoft, that you had?

ATTORNEY BREDEHOFT: Those were the two.

And, your Honor, just so we are clear, I don't agree that we start with the complaints of discrimination from September 29th.

I intend to start earlier, and I think I

November 25, 1996, Page 72, Joint Appendix 04789

ATTORNEY EVANS: Your Honor --

ATTORNEY BREDEHOFT: -- Celindah Grier made mention --

THE COURT: Yes?

ATTORNEY EVANS: This has been already ruled on by yourself, that what happened in June of '93 is irrelevant.

ATTORNEY BREDEHOFT: I don't agree, your Honor.

THE COURT: Well, there cannot be -- evidence of retaliation, if any, must postdate August 4th. And to that extent, the objection is sustained.

The objection is overruled to the extent we

are talking about protected activity that will be factually connected.

Don't nod or shake your head. Simply listen.

That's the Court's ruling. Proceed.

ATTORNEY BREDEHOFT: Thank you.

THE COURT: And I will instruct the jury further on that regard.

ATTORNEY BREDEHOFT: In June of 19 --

THE COURT: In fact, let me tell the jury right now.

For reasons that you don't need to be

November 25, 1996, Page 73, Joint Appendix 04790

concerned about, the retaliation that is pertinent in this case, alleged by the plaintiff, has to be after August 4th.

The plaintiff also has to show protected activity, that is, activity that would be protected by Title 7, as I'll instruct you later. That may predate August 4th.

But you will remember, I told you that this is a case about retaliation. The plaintiff must show that the defendant deliberately retaliated against her for taking protected activity.

So, the only protected activity that would be relevant before August 4th would be that which might conceivably be found by a fact finder to be causing retaliation. That's the only -- that's the Court's ruling.

That comports with your recollection, doesn't it, Mr. Evans?

ATTORNEY EVANS: Yes, your Honor. Yes.

THE COURT: All right. Let's proceed in that regard.

Appendix B

However, when individuals pieces of evidence are offered, if you find or feel they are irrelevant because of the absence of causation, you may object and I will consider the matter, perhaps at the bench.

November 25, 1996, Page 74, Joint Appendix 04791

Remember, what Mr. Evans or Ms. Bredehoft say to you now in opening statements is not evidence.

Remember --

ATTORNEY BREDEHOFT: Thank you, your Honor.

THE COURT: -- it shouldn't be argument either, but lawyers sometimes get carried away a bit. But I am sure Ms. Bredehoft and Mr. Evans will take care not to.

ATTORNEY BREDEHOFT: In June of 1993, Celindah Grier put together a briefing, is what they called it, and that's a series of slides -- in other words, eight a half by eleven pieces of paper with significant points on each page, some of them bold, some of them different sizes, to get the attention of the audience, to make presentations.

Celindah Grier gave a lot of thought and put together a presentation, a briefing, on the subject, which was women at Titan and how to avoid discrimination of women at Titan --

THE COURT: Let me say further at this point, Ms. Grier's claim of unequal treatment of women is not at issue in this case.

The validity or invalidity of that claim is not for you to consider. The only thing that is relevant is whether she engaged in protected activity. So let's

November 25, 1996, Page 75, Joint Appendix 04792

keep it at that.

ATTORNEY BREDEHOFT: The briefing included specific itemizations --

THE COURT: That is precisely what I just gave the instruction for. It doesn't matter what it involved.

ATTORNEY BREDEHOFT: Okay.

THE COURT: That's already -- so you have to keep that to one side, and just say that she made complaints. And that's the only evidence that is going to be permitted.

We are not going into the validity or detail or invalidity or lack of detail of any complaints she may have about gender discrimination. All that's relevant is that she made such complaints, and then, was there retaliation factually connected to that, and is the retaliation of a nature prescribed by law.

Then you also claim that she was constructively discharged as a retaliation, and that, as I have already instructed the jury, is where you have to show the conditions were so intolerable, objectively, that a reasonable person would have had no choice but to leave. That's the case.

Let's proceed.

ATTORNEY BREDEHOFT: The June 1993 briefing

November 25, 1996, Page 76, Joint Appendix 04793

was made to Mr. Knauf, then the president of Titan East, Mr. Carlson, then the chief executive operating officer of Titan East, and Bonnie Good, the director of human resources at that time.

The briefing was then sent to Marsh Nelson. That's the general counsel out at Titan Corporation. And Celindah Grier tried to follow up with Marsh Nelson on that, and he did not return her phone calls.

The next time Celindah Grier made a specific

complaint of discrimination involved her, not just women in general at the company.

That was in August of 1993. She made a briefing on that occasion -- it was supposed to be to Ed Knauf, who couldn't make it, but it also was made to Paul Carlson --

THE COURT: Did I mishear you? You are talking about '93?

ATTORNEY BREDEHOFT: Yes, sir. I believe we will be able to connect these up, your Honor.

THE COURT: I will hear you at the Rule 50 stage on this, and I will rule on it at that time.

ATTORNEY EVANS: If I may state for the record, I think we have had a ruling on this before, and I just ask --

THE COURT: I ruled before that she could

November 25, 1996, Page 97, Joint Appendix 04814

it takes to explain what is going on. Then he turns it over to Cheryl Barr.

Now, the testimony will be that Cheryl Barr does not want to investigate what Celindah Grier has been going through in terms of Allen VanDeventer's treatment of her and, therefore, Mike Walker's agreeing with it or refusing to take any action about it.

Instead, what they want to talk about is only money. That's the only issue to them. They want to talk about supplemental compensation and the MBO and the UEP.

And then Celindah Grier sends a series of memos to Cheryl Barr, eloquently saying:

"I don't want to leave. I am being forced out because I am opposing discrimination. This is retaliation. What Allen VanDeventer has been doing to me in August and September is

absolute retaliation.

"It's not fair that I am being forced out of this company. Look at my history here. You know, here are some solutions."

Here, she is being faced with a situation, still saying, "Here are some solutions. Let's find a way to solve it."

Cheryl Barr only talks to her about leaving

November 25, 1996, Page 99, Joint Appendix 04816

harassment complaint against another white male manager, and she is being berated for that by Mike Walker.

She learns that Allen VanDeventer has berated another individual and, in fact, human resources sits on it and doesn't investigate the claim --

ATTORNEY EVANS: Excuse me, your Honor. Again, if this is supposed to be protected activity, she is getting into --

THE COURT: That last statement wasn't relevant, Ms. Bredehoft. What's relevant is what protected activity this plaintiff contends that she engaged in.

But I don't think that ultimately is going to be the focus of the attention. The question is: Was there any retaliation actually connected to it, and did it -- was there constructive discharge as the Court has defined it?

Address yourself to those points. Take about five minutes and finish up.

ATTORNEY BREDEHOFT: I believe that it was, your Honor.

In any event, Celindah Grier finds out a number of things. But meanwhile she is now at home. They don't even want her to be at work any more. They want her to leave.

Appendix B

November 25, 1996, Page 138, Joint Appendix 04855

March of 1994?
A. Yes, I did.
Q. To whom?
A. To Mike Walker.
Q. Did you complain to anyone else?
A. At that time?
Q. Yes.
A. On one of the occasions, there were actually two complaints. Both were with Mike Walker. On one of them I did go to the human resources department manager, and carried that complaint down.
Q. Okay.
Did you make any complaint of discrimination in May or June of 1994?
A. Yes, I did.
Q. To whom?
A. They would have been made to Mike Walker and Allen VanDeventer.
Q. Now, how did Mr. Walker and Mr. VanDeventer react to your complaints of discrimination in May and June of 1994?
A. They were very angry that I had made the complaint, and said that -- I know I can't tell you what it is, but the issue that I was addressing, they said that I had better fix it, that that was my responsibility to

November 25, 1996, Page 139, Joint Appendix 04856

fix, and they didn't want to hear any more complaints about it.
Q. Did Mr. Walker use any specific terms to you or use any profanity when you were complaining?
A. Not at that time.

Q. Okay.

Now, I am going to move you forward --

A. I'm sorry, he did. He basically -- I guess I don't really think of it as profanity. He said that my complaints were bullshit and that I was responsible to fix it. He would not tolerate any such complaints on his project, and that I better get it fixed.

Q. Now, I am going to just move you quickly ahead to the Summer of 1994. Did there come a time that you took a medical leave?

A. Yes, I did.

Q. And was that -- what period of time was that?

A. I think I went out on June the 20th of 1994.

Q. And when did you return?

A. I returned on August the 8th of 1994.

Q. When you returned on August 8, 1994, what did you find?

A. Well, there was evidently a new organization in the works for Mike Walker's Federal Systems Organization and Mike asked me to take a look at a memo that he was

November 25, 1996, Page 153, Joint Appendix 04870

Mr. Walker said to me that Allen VanDeventer had contacts at the FAA, but he did not have any background in information engineering or business process reengineering; and that's essentially why he asked me to get informed to deal with that aspect of it, which was the only task that was opened up in the beginning of the project.

BY ATTORNEY BREDEHOFT:

Q. Now, did there come a time -- what, if anything, did Mr. Walker say to you in the Winter to Spring of '94 about Mr. VanDeventer's management abilities?

A. He indicated --

ATTORNEY EVANS: Objection, your Honor.

This is irrelevant.

THE COURT: I beg your pardon.

ATTORNEY EVANS: This is irrelevant.

THE COURT: I think I've already ruled on this.

ATTORNEY BREDEHOFT: I don't think so, your Honor. It goes to Mr. Walker's knowledge of Mr. VanDuersen's management.

THE COURT: Come to the podium -- to the bench, rather.

(Thereupon, a discussion at side bar was had on the record as follows:)

November 25, 1996, Page 154, Joint Appendix 04871

THE COURT: What is the purpose of the evidence, what Mr. Walker told her about Mr. VanDeventer's abilities?

ATTORNEY BREDEHOFT: Mr. Walker acknowledged that Mr. VanDeventer had management problems, which is directly relevant to the entire area of August and September, when Ms. Grier was going to Mr. Walker and complaining about Mr. Walker's -- Mr. VanDeventer's treatment.

THE COURT: Why isn't that the validity of the underlying complaints?

ATTORNEY BREDEHOFT: It is a party opponent admission.

THE COURT: He is not saying it is hearsay. He is saying it is irrelevant.

Why is it -- is it relevant whether Mr. VanDeventer was or wasn't having management problems?

ATTORNEY BREDEHOFT: Yes, your Honor.

THE COURT: Why?

ATTORNEY BREDEHOFT: In my view, your Honor, because when Ms. Grier is going to Mr. Walker and complaining about the treatment of herself by Mr.

VanDeventer, Mr. Walker is already on notice that there are problems, and should be -- even if he doesn't think it is discrimination or retaliation, he is already on notice

November 25, 1996, Page 155, Joint Appendix 04872

that there are problems in the past, and that he should be dealing with this. And it goes to the reasonableness of his response.

THE COURT: That is not the point. The reasonableness of his response is not an issue. At least I don't see that it is an issue.

Why is it an issue as to whether they responded?

ATTORNEY BREDEHOFT: Because it goes to motive and intent. If Mr. Walker knew Mr. VanDeventer had management problems, and Ms. Grier goes to him and complains that he is treating her poorly, he says, "Tough luck; you work that out," when he already knows there is an a background of that, it goes to his intentional retaliation of Ms. Grier.

THE COURT: Mr. Evans?

ATTORNEY EVANS: Your Honor, first of all, we have a 404 problem.

Second of all, you are absolutely right, failure to act is not an adverse retaliatory act.

THE COURT: You mean, it is not an adverse employment act?

ATTORNEY EVANS: Thank you. It is not an adverse employment act.

THE COURT: She is saying she is offering it

November 25, 1996, Page 156, Joint Appendix 04873

to show his motive and intent --

ATTORNEY BREDEHOFT: It is a 404 issue.

Appendix B

THE COURT: Only one lawyer at a time.

ATTORNEY EVANS: Yes. I agree it is a 404 issue. He can't, you know --

THE COURT: Well, that's why it would be admissible, if it was 404(b). It is admissible for purposes of motive and intent.

ATTORNEY EVANS: The motive and intent she is talking about now, management problems first with the FAA --

THE COURT: Let me just ask you, Ms. Bredehoft, what motive and intent are you referring to?

ATTORNEY BREDEHOFT: Mr. Walker's motive and intent.

THE COURT: In doing what?

ATTORNEY BREDEHOFT: In how he handles Ms. Greir's complaint to him about Mr. VanDeventer in August and September.

THE COURT: How does he do that?

ATTORNEY BREDEHOFT: A number of different ways, none of them going back to talk to Mr. VanDeventer; one of them, telling her --

THE COURT: Isn't that getting into the validity of the underlying complaint?

November 25, 1996, Page 157, Joint Appendix 04874

You have to avoid nodding and shaking your head. You have to maintain a dispassionate nature.

ATTORNEY BREDEHOFT: No.

THE COURT: Doesn't that relate to the condition of whether Mr. VanDeventer was a good or bad manager?

ATTORNEY BREDEHOFT: It doesn't matter whether he is a good or bad manager.

In this case, it goes to the fact that Mr. Walker has already given an opinion that he believes Mr.

VanDeventer has management problems. But now, after she has complained of discrimination, now she is complaining of retaliation.

THE COURT: The failure of Mr. Walker to address that is not an adverse employment action.

ATTORNEY BREDEHOFT: Your Honor, the fact that he doesn't stop it is retaliation. And I think that you have to, as your Honor has already acknowledged, on adverse --

THE COURT: It may go to constructive discharge, but that doesn't mean --

ATTORNEY BREDEHOFT: It also may be part of adverse employment action.

Remember, your Honor's instruction last time and what your Honor said on Friday, it may not be -- one

November 25, 1996, Page 158, Joint Appendix 04875

particular event may not be an adverse employment action, but if you have a combination of things --

THE COURT: That is for constructive discharge.

ATTORNEY BREDEHOFT: It is also true for adverse employment action, when he is not giving her the assignments.

THE COURT: But that is not what this is about. What you are talking about now is whether VanDeventer was a good or wasn't a good manager. That's not relevant.

ATTORNEY BREDEHOFT: I am not admitting it for the purpose of whether he was or was not. I am admitting it for the purpose that Mr. Walker acknowledged that he wasn't, which then is relevant in August and September.

THE COURT: One last time, Mr. Evans.

ATTORNEY EVANS: Your Honor, it is just not

relevant, because failure to address its validity - I mean, maybe he wasn't a good manager at FAA, but maybe Mr. Walker was a real good manager, did a heck of a job.

And whatever he did, and saying with Ms. Grier, because maybe he concluded Ms. Grier was right, and not VanDeventer.

That is not the issue. The issue is whether

November 25, 1996, Page 159, Joint Appendix 04876

or not there was retaliation.

THE COURT: It is clear to the Court that whether or not Mr. VanDeventer was a good manager or not is not relevant.

It is also clear to the Court that whether the company did the right thing with respect to replacing him or removing him or responding is also not the issue.

What is the issue is whether there was retaliation. Now, it is important to the defendant -- or the plaintiff to show that he made life miserable for her, isn't it?

ATTORNEY EVANS: After August 4th.

Your Honor, you've made a very specific ruling. You ruled specifically that his behavior before August is not relevant.

THE COURT: I don't see it is relevant here. I am going to sustain the objection now. But I will permit you to revise it.

Ms. Bredehoft, if for some reason you can persuade me later on, as the case may develop, that Mr. Walker's motive and intent about not replacing Mr. VanDeventer or not moving her or whatever is an important factor, I don't see it now.

Now, I do see that if he did certain things, VanDeventer did certain things, after August 4th, that

Appendix B

November 25, 1996, Page 160, Joint Appendix 04877

made life difficult for her, that's part of the mix of constructive discharge, and you may show that.

ATTORNEY BREDEHOFT: Thank you, your Honor.

THE COURT: Let's proceed.

(Thereupon, the discussion at side bar on the record was concluded)

(Open court)

THE COURT: All right, you may proceed.

ATTORNEY BREDEHOFT: Thank you, your Honor.

BY ATTORNEY BREDEHOFT:

Q. Ms. Grier, when you became -- when you became the deputy general manager in early March of 1994, where was Mr. VanDeventer on the organizational chart?

A. He was the member of the staff reporting to Dale Hillyer in the Orlando office.

Q. Now, with respect to an organizational chart, as of early March of '94, when you become deputy general manager, will you please explain to the jury what that means in terms of the Federal Systems Organization that you were in?

A. At that time, the Federal Systems Organization was comprised of three divisions. I was -- I had been a division manager and was promoted up to deputy general manager, although I retained some responsibilities at the division management level.

November 25, 1996, Page 161, Joint Appendix 04878

One of the other divisions was located out of our Boston office, and the third division was essentially where all of the AFCIMS Project was assigned within that division.

Q. When is the first time that the AFCIMS project began having Executive Information Systems components to

it?
A. At the time when I went out in June, that task had not been started yet. I believe that sometime in July, when we got some additional money, that Mr. Ford, who was the customer, authorized some preliminary work to that task at that time. And so a very small effort was started, evidently just prior to my return in August.
Q. Now, on August 8, 1994, what is your position as an engineer in Titan Corporation?
A. I was a chief systems engineer.
Q. Please describe -- or describe to the jury what that means.
A. In our career paths, you start at a junior level and you work up; and each level requires a certain amount of qualifications, experience and skills.

The very top level of the career path is the chief level. And so I was at the chief level of the engineering career paths. There were, I think, certainly less than half a dozen of us in the company.

November 25, 1996, Page 163, Joint Appendix 04880

systems engineers?
A. No, they are not.
Q. All right.

Now the third page of this, you indicated, was just specifics and organizational chart on AFCIMS, correct?

ATTORNEY EVANS: Objection, it's a leading question.

THE COURT: It is leading. I will sustain it on that basis.
BY ATTORNEY BREDEHOFT:
Q. The third page, if you can go to Plaintiff's Exhibit Number 155.
A. (Complied)

Q. Will you please explain to the jury what the significance --

ATTORNEY BREDEHOFT: I am trying to figure out how to ask this.

BY ATTORNEY BREDEHOFT:

Q. Were there any other organizational charts as of August, 1994, or August 9, 1994, relating to the AFCIMS Project other than this third page of Plaintiff's Exhibit Number 155?

A. Not to my knowledge.

Q. All right.

November 25, 1996, Page 164, Joint Appendix 04881

Now, where is Allen VanDeventer on this AFCIMS Project?

If you can tell the jury -- and if you want to hold it up for the jury and explain it and point to it, if you want to take it out of the booklet, that might make things easier.

A. You probably can't read it, but basically it, at the very top is the overall project management. The first name under that is Mike Walker.

Mike Walker was officially, from the government and contract perspective, the program manager of the AFCIMS Project.

Right under that is the name Allen VanDeventer, and so he is associated with Mike in the overall project management.

That is a change from everything that had occurred prior to that. He had not been involved --

ATTORNEY EVANS: Excuse me, your Honor, lack of foundation. There's no testimony about what Mr. VanDeventer's position was prior to whenever this document was prepared.

THE COURT: I think there isn't a foundation

at this time, but I am going to overrule the objection and permit it.

Let's move along.

November 25, 1996, Page 165, Joint Appendix 04882

ATTORNEY BREDEHOFT: Thank you, your Honor.

THE WITNESS: The project has now been split into three --

ATTORNEY BREDEHOFT: Let me stop you so we can go back.

BY ATTORNEY BREDEHOFT:

Q. Had Allen VanDeventer been holding that position at AFCIMS on August 8, 1994?

A. No, he had not.

Q. Who had?

A. Essentially, I had.

Q. When you say "essentially," what do you mean by that?

A. Well, prior to that, the only task that had been opened up was the work that we were doing, business area analysis interviews, data collection, all aspects of the business reengineering work that was going on, essentially, out of the Reston office.

There was no work unique to the Orlando office or the area that Allen VanDeventer was supposed to manage, which was the development of the EIS system.

And although there were people from the Olando office who did work on this business area analysis, they were not leads in that area, with, perhaps, the exception of Carl Hurdleman, who was participating

November 25, 1996, Page 173, Joint Appendix 04890

Q. When did you have these conversations and what was said?

A. It was the second or third day, I went in. I said --

THE COURT: Second or third day when?

THE WITNESS: Of when I returned. This would be -- I'll put it in the first week I had returned, in August.

THE COURT: All right.

THE WITNESS: I went in to Mike and I said:

"What exactly are you planning for me to do?

You know, what is it specifically I have in this assignment?

But, you know, I have been the only person that's been involved from the beginning in leading most of this work. We are faced with a deliverable for the end of Phase 1 coming up."

And so I just was curious as to what was kind of going on, what was the status of things, and, you know, where we were going, and how I could get back involved in what was taking place."

Mike indicated to me, he stated that Allen did not want me to be in any kind of a leadership role on the project, and so he thought the best thing for me to

November 25, 1996, Page 179, Joint Appendix 04896

not get along with me. He didn't want me on the project. He considered me noncooperative and did not want me associated with the project.

Q. Did Mike Walker tell you why Mr. VanDeventer felt that way or whether Mr. VanDeventer communicated that to him?

A. He didn't say whether Allen had.

He said at the time that he said -- made the statement that Allen didn't want me. He said:

"You have just been -- you have made too

many complaints about him. You have been -- you have not cooperated with getting him incorporated on the team, in getting everybody to like him and work well with him."

Q. All right.

And what, if anything -- what, if anything, had you complained about were Allen VanDeventer's problems with the program?

A. Well, clearly, he didn't know anything about business reengineering, and I said I was concerned about that at the time.

THE COURT: Is there an objection?

ATTORNEY EVANS: I don't think so, your Honor.

THE COURT: All right, proceed.

November 26, 1996, Page 73, Joint Appendix 04987

My concern was, since I had been on --

ATTORNEY EVANS: Excuse me, your Honor. I think she has answered the question, and now she is going on to some nonresponsive point.

ATTORNEY BREDEHOFT: I don't agree. She is telling what she was saying to Mike Walker. The August meeting is very relevant. What she says and how he responds is very important.

ATTORNEY EVANS: Now she just told us what he said, what she said.

THE COURT: She is going on. Let's see if we can move things on.

Next question, Ms. Bredehoft.

BY ATTORNEY BREDEHOFT:

Q. How long did the August 19th meeting last with Mike Walker?

A. An hour and a half.

Q. Please tell us what transpired in that meeting,

what you said to him and what he said to you.
A. I am going to take a minute and collect my thoughts.

ATTORNEY BREDEHOFT: Take a drink of water with it, while you are doing that.

THE WITNESS: There were -- and I am going to try to summarize rather than go, "he said, she said," I

November 26, 1996, Page 74, Joint Appendix 04988

am going to try to make the major points here.

There were three topics, major topics that I wanted to discuss.

The first one was the concern for the project, and what was going on in the project. The second one was directly in response to Mike's direction to me to make an assessment of Ron; and also, he had asked me, also, about Mr. Stark subsequently.

And the third category was me and what I was perceiving was going -- was, I was very concerned about how I was being treated and how I felt that that treatment also related to potential failure for us on the project. So, they were related in that respect.

Mike agreed with me as to my assessment of the problems on the project.

He was also very concerned that we were not going to meet our deliverable, and he agreed with my statements about the outline and the direction that Mr. Harris was giving the team.

He -- we then talked about Mr. Harris, and Mike specifically told me at that meeting that the reason that they had hired Ron -- and it had been done very quickly -- he explained the circumstances about meeting him in a casual situation, actually on a smoking break. It had not been an advertised position.

Appendix B

November 26, 1996, Page 75, Joint Appendix 04989

But when Mike and Allen met Mr. Harris at the smoking dumpster and chatted with him about what he was doing, and he was talking about BPR, Allen wanted very much to hire Mr. Harris, specifically so that he would not be -- he, Allen, would not be dependent upon me to do this huge effort of work, because Allen did not want me on the project.

And I asked about that.

And Mike specifically said that Allen didn't want me on the project because I had complained about the way he treated women --

ATTORNEY EVANS: Excuse me, your Honor --

THE WITNESS: -- and showed preferential treatment.

THE COURT: Just a moment, when an objection is made.

THE WITNESS: I didn't know there was an objection. I didn't hear it.

ATTORNEY EVANS: We discussed this yesterday for a long time. My objection is asked and answered. This is cumulative testimony.

THE COURT: All right, I will overrule the objection.

Proceed.

BY ATTORNEY BREDEHOFT:

November 26, 1996, Page 76, Joint Appendix 04990

Please continue.

(Pause)

THE COURT: Proceed, Ms. Grier.

THE WITNESS: I am trying to think where I was interrupted, your Honor. I am really trying to keep this narrow.

At that point, Mr. Walker emphasized that --

ATTORNEY BREDEHOFT: I'm sorry, you didn't get to finish the last sentence.

THE COURT: Let her just finish the answer. Don't interrupt her.

Go on, Ms. Grier.

THE WITNESS: Mike's response to my -- I was obviously surprised, and I expressed concern that I was the only person who knew anything about the early part of the project, and that was an essential part, or most of the Phase 1 report. And I didn't know how we were going to be responsive if I wasn't allowed to participate or have a role.

And he stated to me that he very definitely wanted me to have a role. He agreed that I was the only one that had the perspective on how the project had gotten started and proceeded, until I had left.

He was very concerned about Ron Harris' statements to not only me, but evidently a number of other

November 26, 1996, Page 77, Joint Appendix 04991

people that he said he had heard from, that nothing had been done or accomplished before Ron Harris came on board in July, and he was going to straighten that out and straighten out those egos.

But my role was definitely going to have to be in a nonmanagement, non lead type of effort, and that I was going to have to figure out how to support the Phase 1 report and get that information across to the others.

And he accepted my substitute outline as the appropriate outline for the project, and said that I could participate, he needed me to get involved and support the others, get them up to speed and assist in getting the Phase 1 report done; but under no circumstances could I be

in any kind of a leadership role.

The third area that I then brought up was how I had been treated. And I discussed my job description with him that I had left with him before I left, as his deputy, and the roles and responsibilities of that job description, which included taking leadership roles on projects.

And I asked him whether he agreed with the job description, and if not, what were his problems with it, how did he want that changed. Because that was supposed to be the basis of my MBO, which I still had not

November 26, 1996, Page 78, Joint Appendix 04992

received the letter on.

And I ended with asking him:

"How do I know, how can I know what it is you are going to judge me on?

I am being treated very rudely by the staff. They are responding to statements that "are being made by Ron Harris and Steve Stark and other newcomers, as though I am just worthless, you know, not a participant here and not worth even listening to.

I don't know how I can accomplish what you have just asked me to do, if I don't have the respect of the people on this project and they don't have an understanding of what I did on this project before they came on board."

I said:

"So, I really need to know what is the criteria that you are going to judge me by, so I will know how to represent, in order to succeed."

THE COURT: Does that complete your answer?

THE WITNESS: No.

Mike's response to that was:
"I know this is not what you want to hear Celindah. I can't really tell you. I

November 26, 1996, Page 79, Joint Appendix 04993

"really don't know."
That ended the meeting. He walked out of my office.
BY ATTORNEY BREDEHOFT:
Q. Now, I am going to ask you to go back to the part you were testifying about before there was as objection. You testified, you were testifying about the reasons why Mike Walker said Allen VanDeventer didn't want you on the project.
Can you complete your answer? You started with the treatment of women and the preferential, and that is where you had to stop.
A. Yes. It was the treatment -- Allen was upset because I had complained about his treatment of women and his obvious preferential attitude and treatment of the men on the project before in the Orlando office.
Q. Now, at the time of the August 19th meeting, what, if anything, did you say to Mike Walker about leaving Titan?
A. When I was discussing -- that was in the context of when I was discussing how I was being treated, you know, I just said:
"Look, something is definitely going on here. I have been with this company for twelve years, and for twelve years I have had the

November 26, 1996, Page 138, Joint Appendix 05052

Let's proceed. Let's do it quickly.
BY ATTORNEY BREDEHOFT:

Q. Please continue?
A. Mr. Nelson said I would have opportunity to go over specifics at a later time, but he wanted to get to the bottom line, and suggested that I go to the last two or three charts that were in the copy that he had received.

And I said:

"That's going to be very difficult for me to discuss, without having presented my, all of the materials in advance."

And he said:

"I understand. Just do the best you can. I really need to understand the points that you are making in these last three charts."

So, I said I would try to do that.

And he said, "You know" -- again, he said, "I'm sorry, but I really have to leave quickly, so just tell me the bottom line."

And I started to discuss one of the charts, which was a summary related to my complaints of discrimination.

He said:

"We all understand what your position

November 26, 1996, Page 139, Joint Appendix 05053

"has been, but the company feels that they have done everything they need to do."

And I then attempted to go back and address what was specifically happening to me as a new, new category, and --

ATTORNEY EVANS: Your Honor, again, this is --

ATTORNEY BREDEHOFT: Your Honor, she has got to be able to cover this.

THE COURT: I am going to take this up out

of the hearing of the jury.

You may pass your books to the right. During the luncheon recess, refrain from discussing this matter among yourselves or with anyone.

Ms. Grier you may step down. You may not discuss your testimony with anyone while you on the stand.

(Witness stood aside)

THE COURT: The court security officer will maintain these secure. It is now 12:20. We will reconvene at quarter to 2:00.

All right, you may follow the court security officer out.

(Jury excused at 12:20 p.m.)

THE COURT: Ms. Bredehoft, you contend that Mr. Nelson's saying he has only fifteen minutes is an act

November 26, 1996, Page 140, Joint Appendix 05054

of retaliation?

ATTORNEY BREDEHOFT: Conscious disregard for her rights. She is complaining of discrimination.

THE COURT: If that is your conscious disregard, it will not survive a Rule 50.

ATTORNEY BREDEHOFT: There are number of conscious disregards. There are many elements of it.

On top of that, not letting her go through and fully relate the retaliatory conduct that happened in August and September --

THE COURT: She is not going to repeat all of that. You have just taken her through all of that. She is not going to go through and use this as an opportunity to say, "Nobody would talk to me, and they took me off this."

That's all been said. It's not going to be repeated. Is that clear?

ATTORNEY BREDEHOFT: Yes, your Honor.

THE COURT: All right.

ATTORNEY BREDEHOFT: The point is, she doesn't get to say all that she want to say. She wants to talk about it.

They say, "No."

She needs to be able to testify --

THE COURT: Just ask her: Did you have an

November 26, 1996, Page 141, Joint Appendix 05055

opportunity to tell them?

She says, "No." Let's go on.

You know, Ms. Bredehoft, I understand -- and Ms. Grier, you as well -- that you have a difficult time saying everything you want to say, but we really do have to move it along.

ATTORNEY BREDEHOFT: I am trying, your Honor. As you can tell, my client is having a great deal of difficulty being able to express herself, and I am doing the best I can. But we need to air this. The Court has already ruled --

THE COURT: All that she is going to say is she didn't have, she wasn't given an opportunity to air her complaints about retaliation; is that right?

ATTORNEY BREDEHOFT: Well, she is going to say she wanted -- she said, "I want to talk about these, these acts that have happened to me in the last two months."

And he said, "No, we have done everything we are going to do."

And then he turns it over to Cheryl Barr, and then we get into the events that transpired after this meeting.

THE COURT: Which are?

ATTORNEY BREDEHOFT: That's the, you know,

Appendix B

November 26, 1996, Page 142, Joint Appendix 05056

"You have to leave, you know, we are not going to address these things."

They take her completely off work. They put her on an administrative overhead number. She is now at home, not even -- she is working out of the office rarely. She is communicating with Cheryl Barr. She is communicating with Mr. Knauf.

THE COURT: What we are going to have to avoid are these long narratives by the witness. Ask your questions pointedly, directed at what's relevant. Get the answer, and let's move on. This matter, all of this could have been obtained in much less time.

So, you may ask her:

"Did you express, did you express your views about what had been happening to you in August and September?

"No.

"Why not?

"I wasn't given an opportunity."

Next question. Move on. That takes about five seconds instead of five minutes.

So, we have got to move on.

Yes, Mr. Evans?

You don't have any objection to the question about whether she was given an opportunity to state? I am

November 26, 1996, Page 143, Joint Appendix 05057

going to let her repeat what they all were.

ATTORNEY EVANS: I agree, if she feels she wasn't given sufficient time, she can say that.

But, what I also want to note for the record is, what she is now saying and what she just said and what counsel just proffered what she is going to say, the big

failure is, there is a problem, a failure to address --

THE COURT: We will deal with that at the Rule 50 motion. That will not be a basis for constructive discharge, the refusal to address the issues.

In fact, one of the principal issues -- and this is, I mean, it goes both ways, Ms. Bredehoft and Mr. Evans, it goes both ways.

Some of her complaints, a jury has found, are invalid. Another complaint that she helped with, I think some other person, did prevail in court.

This jury isn't going to know either of those, and we are not going to spend any time -- I am going to tell them again, if it's necessary, in the course of the trial, and I'll certainly tell them at the end, that the validity or invalidity of any claims of discrimination made by the plaintiff about herself or anyone else are not relevant in this case.

ATTORNEY EVANS: I agree, your Honor.

The only thing I would like to reiterate,

November 26, 1996, Page 152, Joint Appendix 05066

Bring the jury in, please.

(Jury impaneled at 1:52 p.m.)

THE COURT: Ms. Grier, you may resume the stand.

(Witness resumed stand)

THE COURT: You will recall, you are still under oath.

THE WITNESS: Yes, sir.

THE COURT: All right, Ms. Bredehoft, let's complete the direct examination now.

ATTORNEY BREDEHOFT: Thank you, your Honor.

THEREUPON, CELINDAH J. GRIER, previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION (Continued)

Appendix B

BY ATTORNEY BREDEHOFT:
Q. Ms. Grier, I would like take you back to the September 29th briefing. What was the final thing that you said with respect to your treatment over the past two months?
A. I said that it had been intolerable, and that if the company was going to take the position that they weren't going to listen or hear what that treatment had been or take any action, then I guess what they were telling me was that I would have to work for a different kind of company.

November 26, 1996, Page 153, Joint Appendix 05067

Q. Okay.
ATTORNEY EVANS: Your Honor, I would move to strike the answer. The issue of the details of her complaint and the validity or invalidity of what she is saying is not at issue.
ATTORNEY BREDEHOFT: I don't agree. This is the retaliation aspect.
THE COURT: Well, it's true, what Mr. Evans said there is true.
You say retaliation, Ms. Bredehoft. I have already ruled about what the parties can show about the failure to address, and I am going to instruct the jury at the appropriate time that the failure to address, standing by itself, even if it is shown, is not constructive discharge.
Her subjective beliefs about whether things were intolerable are also not the standard. The standard is one of objective. So, let's move on. I think what you intended to elicit is she complained about her treatment of herself.
Now, you can elicit what the response was, and let's move on.

Appendix B

BY ATTORNEY BREDEHOFT:
Q. What was the response?
A. I was told that I should contact Cheryl Barr, and

November 26, 1996, Page 154, Joint Appendix 05068

that she would -- Marsh Nelson designated her as the person that I should deal with in following up from the meeting, and that she would be my point of contact for further discussions, and the meeting was concluded, essentially --
Q. Okay, now, let me just stop for a moment.
What, if any, computer equipment had you been given in August and September of 1994 to effect the work on the AFCIMS Project?
A. I had not been given the computer that was needed to do the work that I was doing.
Q. And what is the significance of not having the computer?
A. Well, it essentially rendered me incapable of performing business area analysis and the modeling, which was my area of expertise. It effectively excluded me from doing that work.
Q. Did you ask Mike Walker for a computer?
A. Repeatedly.
Q. What, if anything, did Mike Walker say?
A. He said that there was no money in the budget for it.
Q. Did you have my reason, or see any reason to lead you to believe that was false?
ATTORNEY EVANS: Your Honor, what her

November 26, 1996, Page 185, Joint Appendix 05099

He was telling me I could have a title back.
And I asked him, "Exactly what does that

mean?" What was I going to do?

The deputy general manager position was an overhead position and I knew that there was no money for that, so what was I going to charge my time to? And what was I going to work on?

Ed said --Mr. Knauf said, "I will make money available for your position as deputy general manager."

And I said:

"Ed, you and I both know that can't last forever. I have to have substantive work to do. There isn't enough money for me to bill 100 percent direct.

"I have never been 100 percent direct. I have never been a totally administrative person. I have here twelve years, always been primarily a technical person working on projects. What am I going to do?"

And he said there was always work coming into the company. He was sure there would be something else. I could work on it, but -- and that I could work some; that Allen said:

"Allen has agreed that there is probably work you can do on the AFCIMS, but it's not

November 26, 1996, Page 186, Joint Appendix 05100

"going to be as the chief engineer, and it's not going to be as the project manager, and it's not going to be any leadership role."

And I said:

"So, essentially, you are taking my position, my level in the company as the chief engineer away from me, and you are saying I can have this title back. But you haven't addressed anything about how I am going to do my job, what I am going to do on a day-to-day basis; much

less, have you even addressed how I was being treated."

And Mr. Knauf said:

"My understanding is that you didn't want to lose your job, and I am telling you, you don't have to lose your job. I am going to see to it that you can come back and you can be my deputy general manager. What you and Mike work out as far as what you are going to do is up to you."

I said at that point:

"Well, I will have to think about that."

But I also wanted to know if the severance that had been -- I had been informed of earlier was still on the table.

November 26, 1996, Page 213, Joint Appendix 05127

accommodate this, and I think we will take a early lunch tomorrow. It will be a bit short, but no need to worry about compensating for it. I can understand. I think 2:30 is fine, and we will do that.

All right, Mr. Evans, are you ready to cross-examine the plaintiff?

ATTORNEY EVANS: Yes.

THE COURT: You may proceed.

THEREUPON, CELINDAH J. GRIER, previously duly sworn, was examined and testified as follows:

CROSS-EXAMINATION

BY ATTORNEY EVANS:

Q. Good afternoon, Ms. Grier.

Ms. Grier, now, on November 2, 1994, you knew that you were able to continue to work at Titan, right?

A. That's correct.

Q. And did anyone at Titan tell you, you had to leave

the company?
A. Those words were not used.
Q. Do you recollect being under oath another day April 9, 1996, and being asked that question and giving the answer "No"?
A. That's correct.
Q. I want to talk about this --

December 2, 1996, Page 60, Joint Appendix 05451

What do you mean by, 'exchanging "'words'"

Were you having a heated argument?
A. No, no, we were just having a friendly conversation. And during the conversation, Celindah -- excuse me, Cheryl was turned towards Marsh Nelson, and said that Celindah was a troublemaker and that Titan had or was formulating a plan to get rid of her.
Q. And what, if anything, did Marsh Nelson say in response though that?
A. I don't recall Marsh Nelson making any response to that statement.
Q. Did you know who Celindah Grier was?
A. Yes, I did.
Q. And how frequently had you had contact with Celindah Grier over the years?
A. Outside of -- I had been in contact with her about some benefits issues, but I had only met her twice prior to that conversation."

(Thereupon, the reading of the testimony of Greg Monsma was interrupted.)

ATTORNEY BREDEHOFT: This is by counsel for Titan.

(Thereupon, the reading of the testimony of

Appendix B

December 2, 1996, Page 75, Joint Appendix 05466

A. For Titan Corporation.
Q. When were you hired as human resources manager for Titan Corporation?
A. In August 1994.
ATTORNEY BREDEHOFT: Your Honor, I would like to request permission of the Court to be able to ask leading questions of this witness.
THE COURT: All right, you may proceed.
ATTORNEY BREDEHOFT: Thank you.
BY ATTORNEY BREDEHOFT:
Q. Were you present during the September 29th briefing that was requested by Ms. Grier?
A. Yes, I was.
Q. And you received a copy of the briefing, did you not?
A. Yes, I did.
Q. And your perception was that Ms. Grier was complaining about upward mobility --
ATTORNEY MICHELS: Objection, your Honor. We are getting into the specifics of the complaint. That has already been ruled on.
THE COURT: Well, the validity or invalidity of Ms. Grier's claims is irrelevant in this case --
ATTORNEY MICHELS: The perception --
THE COURT: Wait just a minute. I'm not

December 2, 1996, Page 76, Joint Appendix 05467

done yet.
ATTORNEY MICHELS: I'm sorry.
THE COURT: Are you going to do this, instead of Mr. Evans? He gets a rest?
ATTORNEY MICHELS: Yes, I am.
THE COURT: I sustain the objection on the

grounds I previously stated.

Proceed.

BY ATTORNEY BREDEHOFT:

Q. You are aware that Ms. Grier was the highest ranking technical employee at Titan Corporation, are you not?

ATTORNEY MICHELS: Your Honor, relevance, again.

THE COURT: I overrule the objection.

You may answer that question.

THE WITNESS: Yes.

BY ATTORNEY BREDEHOFT:

Q. And during this conference, Ms. Grier made reference to a previous presentation, did she not?

ATTORNEY MICHELS: Objection, your Honor --

ATTORNEY BREDEHOFT: I am not talking about the substance.

THE COURT: Come to the bench.

(Thereupon, a discussion at side bar was had

December 2, 1996, Page 88, Joint Appendix 05480

not?

A. Yes, I said that.

Q. What was the trouble that you perceived Ms. Grier stirring up?

A. She was trying -- she was trying to make issues where there weren't issues, trying to concern people and, I felt, maybe get the company to offer her something because she knew she wasn't going to stay there.

Q. Now, what is it that you were aware of, what facts did you have that Celindah Grier had decided it was time to move on?

ATTORNEY MICHELS: Objection, your Honor, relevance, and again going back to the issue that we discussed.

THE COURT: The question was: What facts did she have to, on which she relied in believing that Ms. Grier wished to move on?

I think you must have misheard that. You object to that?

ATTORNEY MICHELS: I am objecting to it because I think it is going to go into the issue we discussed at the bench conference, your Honor.

THE COURT: I overrule the objection.

You may answer.

THE WITNESS: I don't think it really had

December 2, 1996, Page 89, Joint Appendix 05481

any facts. It was an impression that I got.

BY ATTORNEY BREDEHOFT:

Q. And what facts did you have that Ms. Grier was raising issues with the company?

A. I had been in on the conferences you mentioned and I knew that she was saying that women didn't have an opportunity and these kinds of things, and I didn't have any reason to believe that.

Q. Did you have any reason to disbelieve --

THE COURT: The merits or demerits of that, the merit or lack of merit are not relevant here. Let's proceed.

BY ATTORNEY BREDEHOFT:

Q. Ms. Sundin, you were the manager of human resources for Titan East at the time you made this statement, correct?

A. Titan Systems Group, the eastern portion of it, yes.

Q. And your attitude was that someone who made complaints like you've just described was stirring up trouble?

A. She didn't make any specify complaints. She just

made these vague allegations about people, women not having appropriate opportunity, and there wasn't any evidence of that.

December 3, 1996, Page 107, Joint Appendix 05860

THE COURT: There was never a question of returning. I don't recall anybody testifying about her returning. There was testimony about her staying.

Do I miss something, Ms. Bredehoft?

ATTORNEY BREDEHOFT: She was given an administrative charge number, and not permitted to do any work the entire month of October and four days in November.

THE COURT: That is not leaving the company, Ms. Bredehoft.

You may ask the question.

ATTORNEY BREDEHOFT: It is not serving as deputy general manager, either.

BY ATTORNEY BREDEHOFT:

Q. What would Celindah Grier have been doing with the TEQCOM program?

A. Not very much; they hired a new manager for the TEQCOM division.

Q. What direct billing could Celindah Grier do on November 5, 1994, if she continued as deputy general

December 5, 1996, Page 60, Joint Appendix 06484

through the ones that were specifically testified to in connection with Allen VanDeventer and Mike Walker. Starting in May and June of 1994, Ms. Grier makes a number of complaints.

Now, how do you know that's true?

Because in cross-examination of Mike Walker, I said, "What" -- "You said Celindah Grier is always complaining about something. What was she complaining

about?"

And what did he say? About how they were getting this and we were getting that, and of course the theys and the we's are the Orlando and the Reston office. The we's was the Reston office, all women; the theys was the Orlando office, all men.

And Celindah Grier said specifically, "I am talking about how the women are treated up here."

The next one, August of 1994, after the organizational chart comes out, the organizational chart that she is referring to is the August one, which is Plaintiff's Exhibit 155.

She says, she complains again of discrimination to Mike Walker, and he is not happy with her about that.

And by the way, back when she makes the complaint in May and June, the response that Mike Walker

December 5, 1996, Page 61, Joint Appendix 06485

gives her is, "That's bullshit. You have to fix it. It's your problem."

And so she tries to fix it. She goes out to dinner with Allen VanDeventer. That's something that somebody who is a responsible supervisor tries to do to fix the problem.

"Okay, you are right. There is a problem here. Let's see if we can try to get this resolved."

And he just personally and professionally attacks her.

She complains again when she comes back in August and says, "Look, we've got another discrimination issue."

He says, "I don't want to deal with it."

Then she complains again in, later in August, again to Mike Walker, brings to his attention Luba

Vladavsky's complaints about Allen VanDeventer.

And he said, "Counsel Ms. Vladavsky not to say these things."

That's the response again.

Then the next protected activity is assisting in the sexual harassment, September 24th.

Then the next one, September 29th. Now, nobody disagrees on the September 29th. Clearly, by this time, she's got her slides, she has made a presentation,

December 5, 1996, Page 153, Joint Appendix 06577

on her claim of retaliation, plaintiff must prove by a preponderance of the evidence that she complained of gender discrimination or assisted another in complaining of gender discrimination, that the defendant took an adverse employment action against her after August 4, 1994, and that plaintiff's complaints of discrimination or her assisting another in complaining of discrimination were known to defendant, and that they were the determinative factor in defendant taking the adverse employment actions against plaintiff.

It is not necessary that her complaints of discrimination and her assistance to others were the only reasons, but those must have been a determinative, or "but for" cause of any adverse employment actions.

During the trial, you heard evidence that plaintiff made complaints of gender discrimination while at Titan. This evidence was introduced for the purpose of attempting to show that plaintiff engaged in this form of protected activity.

The validity or invalidity of those complaints is not relevant to this case, and should not be considered by you in determining whether plaintiff was retaliated against by defendant.

Nor should you be concerned with the results

of any investigation of the complaints undertaken by

December 6, 1996, Page 154, Joint Appendix 06578

defendant.

You are also instructed not to be concerned with whether the parties actually reached an agreement to settle this matter.

You may consider the denial of compensation to be an adverse employment action, if you find by a preponderance of the evidence that the determinative factor in the denial of the compensation was the plaintiff's complaints of discrimination. You may not find denial of compensation was an adverse employment action for any other reason.

An adverse employment action is an ultimate employment decision, such as hiring, granting leave, discharging, constructively discharging and compensating.

Failure to believe or address plaintiff's complaints of discrimination are not adverse employment actions. Actions such as rudeness, giving less favorable work assignments or failure to promote, taken by themselves, are not adverse employment actions.

Plaintiff claims that defendant's retaliation in part took the form of constructive discharge. A person is constructively discharged when her employer deliberately makes her working condition so intolerable that a reasonable person would feel compelled to resign.

APPENDIX C - ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION FILED NOVEMBER 20, 1996 (J.A. 04711)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 95-900-A

CELINDAH GRIER,

Plaintiff,

v.

TITAN CORPORATION,

Defendant.

ORDER

The matter came before the Court on numerous motions by plaintiff and defendant. Plaintiff's motions included:

1. a motion for a Protective Order;
2. a motion for clarification on constructive discharge;
3. a motion to quash two witness subpoenas or, in the alternative, to exclude testimony; and
4. eight motions in limine.

Defendant's motions included:

1. a motion for partial summary judgment on punitive damages;
2. a motion in limine to restrict plaintiff from alleging or attempting to prove acts of retaliation before September 29, 1994; and

3. twenty one motions in limine.

For the reasons stated from the bench and in this Order:

a. Plaintiff's motion for a protective order is DENIED AS MOOT, the motion having been denied in the November 13, 1996 Order entered by another Court in this division;

b. Plaintiff's motion to quash two witness subpoenas or, in the alternative, to exclude testimony is DEFERRED UNTIL TRIAL;

---

1. This motion was resolved by the Court in its Order of November 15, 1996.

(J.A. 04712)

c. Plaintiff's motions in limine are decided, as follows:

1. motion in limine to introduce defendant's Annual Report for 1995 is DENIED, because the Court concludes that the parties' stipulation to defendant's net worth is adequate in this case and the remainder of the Annual Report is irrelevant;
2. motion in limine to introduce plaintiff's exhibit 140 is DENIED, and plaintiff's request for a special verdict form question on lost and future income damages is DEFERRED TO TRIAL;
3. motion in limine requesting reconsideration of admissibility of certain submissions made by plaintiff to defendant is DENIED;
4. motion in limine to admit prior testimony of Greg Monsma is DENIED IN PART and GRANTED IN PART; the motion is denied as to testmony given in the cast styled Amato v. Titan Corporation, C.A. No. 95-901, and granted with respect to previous

testimony in this case, provided that this prior testimony is otherwise admissible;

5. motion in limine to exclude fact of retrial, as well as findings of the retrial, is DENIED AS MOOT, based on representations by counsel for both parties that they will take steps to avoid any reference to the fact of retrial;
6. motion in limine to admit fact of another employee's retaliation judgment against defendant is DENIED;
7. motion in limine to clarify the admissibility of evidence of other trials against defendant is GRANTED, and evidence concerning other cases against defendant is EXCLUDED; and
8. motion in limine concerning the jury instruction on constructive discharge is DEFERRED TO TRIAL.

d. defendant's motion for partial summary judgment on the issue of punitive damages is denied; but defendant is not precluded from moving for judgment as a matter of law, pursuant to Rule 50, Fed. R. Civ. P., at the appropriate time should circumstances warrant;

e. defendant's motions in limine are decided, as follows:

1. motion in limine to restrict plaintiff from alleging or attempting to prove acts of retaliation occurring

(J.A. 04713)

before September 29, 1994 is GRANTED IN PART and DENIED IN PART; plaintiff may not attempt to prove acts of retaliation occurring before August 4, 1994, though plaintiff may seek to prove protected activity occurring before that date, provided there is record evidence of a causal nexus

between the protected activity and the alleged acts of retaliation;

2. motion in limine to restrict plaintiff from alleging or attempting to prove retaliatory conduct constituting a "continuing violation" under Title VII is GRANTED, plaintiff may not attempt to prove acts of retaliation occurring before August 4, 1994;
3. motion in limine to prevent plaintiff from arguing the validity of plaintiff's underlying discrimination claims is GRANTED, however, plaintiff will be permitted to testify that she made allegations to defendant of sex discrimination by defendant, and plaintiff will be permitted to produce evidence of what, if any, responses were made by defendant to the allegations;
4. motions in limine concerning plaintiff's counsel's improper comments about a witness, and improper jury arguments are DENIED AS MOOT, given counsel's representation to the Court that she will refrain from these improper comments and arguments;
5. motion in limine to exclude evidence of repercussions to Greg Monsma for testifying in this matter are DEFERRED TO TRIAL;
6. motion in limine to exclude improper testimony from plaintiff's daughter is DENIED AS MOOT;
7. motion in limine to exclude evidence of training regarding sex discrimination is GRATED; such evidence is not relevant to plaintiff's retaliation claim, notwithstanding plaintiff's reliance on Spicer v. Commonwealth of Virginia Dept. Of Corrections, 66 F.3d 705 (4th Cir. 1995) (in secual harassment claim, training on discrimination considered in determination of whether employer took remedial measures neccssary to avoid imputing liability to employer for harassment by employees);

8. motion in limine to exclude testimony regarding the circumstances surrounding the independent medical examination is DENIED;
9. motion in limine to exclude evidence of Allen Van Deventer's personal relationship with Luba Vladovsky is

(J.A. 04714)

DENIED;
10. motion in limine to exclude evidence of other employees leaving defendant is GRANTED;
11. motion in limine to exclude defendant's responses to requests for admission is DENIED;
12. motion in limine to exclude personnel files of other employees of defendant is GRANTED, although plaintiff has leave to request permission to introduce them in rebuttal if warranted under the circumstances;
13. motion in limine to exclude plaintiff's complaints of unequal compensation is GRANTED, except that plaintiff may adduce evidence of the MBO, Supplemental Compensation, and UEP to the extent that these forms of compensation constitute damages for constructive discharge and retaliation;
14. motion in limine to exclude testimony from plaintiff regarding derogatory statements made about her by Titan Corporate Officers is addressed in a separate order;
15. motion in limine to exclude evidence read from defendant's 10-K filing is GRANTED because the Court concludes that the parties' stipulation to defendant's net worth is adequate in this case and the remainder of the 10-K filing is irrelevant;

16. motion in limine to exclude plaintiff from testifying as to damages incurred from leaving Titan and accepting other employment is DENIED;
17. motion in limine to exclude testimony of psychological treatment of plaintiff for work-related stress prior to August 4, 1994 is GRANTED, but plaintiff has leave to request permission to introduce such testimony in rebuttal if warranted under the circumstances;
18. motion in limine to exclude testimony of Greg Monsma regarding statements made about plaintiff by Sheryl Sundin is DENIED, given that the statement is a non-hearsay party admission relevant to defendant's intent in plaintiff's constructive discharge claim;
19. motion in limine to exclude testimony concerning the terms of release which plaintiff refused to sign is GRANTED;
20. motion in limine to exclude testimony concerning the cause of and reasons for plaintiff's hospitalization is

(J.A. 04715)

GRANTED;

21. motion in limine to exclude testimony concerning the behavior of Allen VanDeventer and other employees of defendant toward plaintiff if GRANTED IN PART and DENIED IN PART; the motion is granted with respect to behavior before August 4, 1994, and denied with respect to behavior directed toward plaintiff which took place after August 4, 1994.

Appendix C

The Clerk is directed to send copies of this Order to all counsel of record.

United States District Judge
T.S. Ellis, III

Alexandria, Virginia
November 20, 1996